SUPREME COURT OF THE UNITED STATES.

No. 244.

PHILEMON B. EWING, COMPLAINANT AND APPELLANT,

vs.

THE CITY OF ST. LOUIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

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1 MISSOURI DISTRICTS, *sct:*

Pleas before the honorable the judges of the circuit court of the United States for the districts of Missouri, at October term, in the year of our Lord 1864, in case of—

PHILEMON B. EWING, complainant,
ag'st
THE CITY OF ST. LOUIS, defendant. } In chancery.

Be it remembered, that heretofore, to wit, on the twenty-ninth day of May, 1861, came the complainant in the above-entitled cause, by his solicitor, and filed in the office of the clerk of the circuit court of the United States for the districts of Missouri his bill of chancery, viz :

Bill.

To the judges of the circuit court of the United States within and for the districts of Missouri:

Philemon B. Ewing, who is a citizen and resident of the State of Ohio, brings this his bill against the city of St. Louis, a municipal corporation under the laws of the said State of Missouri, having its seat within said State of Missouri; and thereupon your orator complains that at the date first hereinafter named and from thence hitherto he was and still is the owner of certain lots of land in the said city of St .Louis, particularly known and described as being lots 5 to 17, inclusive, and 39 to 41, inclusive, in block 15, Stoddard's addition. That on the 21st day of November, A. D. 1857, the city council of said city passed an ordinance providing for the opening of Wash street from Pratt avenue to the St. Charles road, running through said block 15, and appropriating for the use of said street certain parts of the lots so owned by the complainant as aforesaid, a plat of which said premises
2 is hereto attached and made a part of this complainant, showing the location of said lots and the line of said street as it cuts the same. That certain proceedings were thereupon had by the officers of said city, assumed to be in pursuance of the laws and ordinance in force and providing for the assessment of benefits and damages arising from the opening of such streets, and that as the final result of such proceedings there was entered on the records of judgments, kept in the office of the mayor for like cases, three several judgments in favor of said city of St. Louis and against this complainant, one for the sum of $1,227 50 and two for the sum of $3,383 04 each, amounting in the aggregate to the sum of $7,993 54, for so much assumed and pretended benefits arising to said property by reason of the opening of said street.

The complainant is informed and believes that same attempted notice by publication was procured by the mayor for the purpose of acquiring jurisdiction over the complainant in the matter of opening said street, but that the same were irregular and defective in several material particulars, and that no jurisdiction was acquired by virtue thereof; and he avers that he had no actual notice of the time and place of the assembling of the jury for the assessment of such benefits or of the pending of the matter before them; and he avers and charges that the said pretended verdict of the jury and all subsequent proceedings founded thereon are irregular and void as against him, for want of jurisdiction over him by the said tribunal. He is further informed and believes that said several judgments were not in fact entered up by the mayor within 20 days after the 9th day of November, A. D. 1858, being the date of the passage of an ordinance by the city council confirming

the award of the jury in the said proceedings, but that the same were
3 entered by the clerk having charge of said record long after the expiration of said term, and have not at this date been signed by the mayor or made to bear any mark of his approval and judgment thereon.

Complainant further represents that he is informed and believes that the opening of said street was procured at the instance and urgent solicitation of parties owning lots fronting on said Wash street eastwardly of Pratt avenue and for their benefit, and in no respect for the benefit or at the request of any one of the persons owning property on said street westwardly of Pratt avenue, but, on the contrary, said last-named parties remonstrated and opposed the opening of said street as threatening to damage their property. That in the assessment of the benefits arising from the opening of said street, the property of the parties at whose instance and for whose benefit the same was opened, was not assessed to the extent of one dollar, which excessive and oppressively unjust assessments were made against complainant and others, so excessive in the case of the complainant as to amount to an arbitrary seizure by confiscation of his property as in lots 38, 39, and 40, where nearly one half of area by average front was appropriated and assessed at $1,027 50, while he is charged with the benefits on the remaining parts at the sum of $1,227 50, which last sum he is advised and believes is more than the cash value of said property left at the date of said proceedings or at any subsequent time to this date.

He further represents that the said judgments so entered on the Record of Judgments in the office of the mayor operate to cloud and obscure the title to his said property by reason of the pretended lien therefor, and prevent him making such lawful use and disposition of his property as he otherwise might. And he apprehends that the officers of said city may proceed
4 to issue execution on said pretended judgments and still further embarass and disturb him in the possession and enjoyment of his said property.

He therefore prays that said city of St. Louis be made party defendant hereto, and be required to answer in the premises, and that on final hearing it be decreed that said pretended judgments be set aside and annulled as being void for all purposes and of no effect, and that the mayor and all other officers and agents of said defendant be enjoined from any and all proceedings against complainant in his person or his property by reason of said pretended judgments.

Complainant avers that the amount in controversy in this suit exceeds the sum of five hundred dollars.

(Signed) B. A. HILL.

With JONES & SHERMAN, *Counsel for Complainant.*

Eleazer Sherman, agent for the complainant herein, makes oath and says that he believes the matters and things as set forth in the above and foregoing bill are true.

(Signed) ELEAZER SHERMAN.

Sworn to and subscribed before me this 29th day of May, 1861.

(Signed) BEN. F. HICKMAN, *Clk U. S. C. C., Mo. Dis.*

[Here follows map, page 4.]

5 And on the 29th day of May, A. D. 1861, the following order was made in this cause in vacation, to wit :

Order for subpœna.

PHILEMON B. EWING, complainant,
ag'st
THE CITY OF ST. LOUIS, defendant. } In chancery.

This day comes the complainant, by Messrs. Hill, Jones & Sherman, his solicitors, and files his bill against said defendant; and on motion of said solicitors, a subpœna in chancery is awarded thereon returnable to rules on the first Monday of July next.

And at rules, begun and held at clerk's office of July 1st, A. D. 1861, the following order was made, to wit:

Appearance entered.

PHILEMON B. EWING, complainant,
ag'st
THE CITY OF ST. LOUIS, defendant. } In chancery.

This day come the defendant, by C. G. Mauro, esquire, its solicitor, and enters its appearance to the bill of complainant's herein; which appearance is as follows:

United States circuit court, in equity.

PHILEMON EWING
vs.
CITY OF ST. LOUIS.

Now comes the above-named defendant, and by solicitor and agent enters appearance herein, signed C. G. Mauro, solicitor and agent for def't.

And at rules begun and held at clerk's office, on the 5th day of August, A. D. 1861, the following order was made, to wit:

PHILEMON B. EWING, complainant,
ag'st
THE CITY OF ST. LOUIS, defendant. } In chancery.

This day comes the defendant, by C. G. Mauro, esquire, its solicitor, and files a demurrer to the bill of complainant herein; which demurrer was certified to by said solicitor and sworn to by James Fortune, comptroller of the city of St. Louis, as required by the rule of this court; which demurrer is as follows:

6

Demurrer to bill of complainant.

Circuit court of the United States for the district of Missouri, in equity.

PHILEMON EWING
vs.
CITY OF ST. LOUIS.

The defendant by protestation, not confessing or acknowledging all or any of the matters or things in said bill contained to be true in manner and form as the same are therein set forth and alleged, doth demur in law to the said bill, and for cause of demurrer showeth that said complainant hath not in his said bill made such a case as entitled him in a court of equity to any relief from or against the defendant touching the matters contained in such bill or any such matters; that the object of said bill is to set aside as null and void and to enjoin the enforcement of certain judgments therein mentioned; but said bill omits to show with sufficient certainty the said proceedings, and the laws and ordinances under which they were had; that said bill fails to set forth and show to the alleged irregularities and defects in the notice by publication to complainant, or that any notice was necessary

to the validity of such proceedings and judgments; that said bill neglects to aver and show that jurisdiction over the person of complainant was necessary to give validity as to him, to the proceedings sought to be impeached by said bill; that it does not appear from said bill that the complainant had not full notice of said proceedings, and that he was not present thereat either in person or by attorney; that it does not appear from said bill that by the charter of the city of St. Louis, or by any ordinance thereof, it was essential to the validity of said proceedings that the mayor of said city should enter up the judgments specified therein within twenty days after the passage of an ordinance of said city confirming the
7 award of the jury; that it does not appear from said bill that it was essential to the validity of said pro and judgments that they should have been had at the request or for the benefit of persons owning property on Wash street west of Pratt avenue; that on the matters stated in said bill the complainant has a full and effectual remedy at law; that the complainant has not in said bill shown any sufficient matter of equity to entitle him to the relief sought against defendant. Wherefore and for divers other good causes of demurrer appearing in said bill of complaint this defendant doth demur to said bill, and to all matters and things therein contained, and prays the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Signed) C. G. MAURO, *for Def't.*

I, Charles G. Mauro, counsel for the defendant in the above-entitled cause, do hereby certify that in my opinion the aforegoing demurrer is well founded in point of law.

(Signed) CHARLES G. MAURO.

James Fortune, comptroller of the city of St. Louis, and in its behalf, being duly sworn, upon his oath says that the aforegoing demurrer is not interposed for delay.

(Signed) JAMES FORTUNE, *Comptroller.*

Subscribed and sworn to before me this 5th day of August, 1861.

(Signed) BEN. F. HICKMAN, *Cl'k.*

And on Friday, the 10th day of October, A. D. 1862, the following order was made, to wit:

PHILEMON B. EWING, complainant, *ag'st* THE CITY OF ST. LOUIS, defendant. } In chancery.

This day comes the complainant, by his solicitor, and with the leave of the court files an amended bill herein; which amended bill is as follows:

To the honorable the circuit court of the United States within and for
8 the district of Missouri, in chancery sitting:

Your orator, Philemon B. Ewing, a citizen of the State of Ohio, residing in said State, having heretofore exhibited his bill of complaint in this honorable court against the city of St. Louis, a municipal corporation duly organized as such according to law, within the State of Missouri, and being located within said State and within the territorial jurisdiction of this court, (which cause is still pending and undetermined,) special leave of this honorable court for this purpose, the defendant consenting thereto, first had and obtained, comes and files in substitution of his said original bill of complaint this his amendment thereof, waiving all relief in pursuance of the prayer of his said original bill, save only in so far as may be proper to be

granted upon the allegations and prayer of this his said amendment. And your said orator, in substitution for and in amendment of his said original bill of complaint, states and avers that he, your said orator, on the 7th day of August, A. D. 1858, and at and before the enactment of certain supposed and pretended ordinances by the city council of said city, numbered 3,477, 4,053, and 4,102, hereinafter more particulary referred unto, and from thence hitherto was, and hath been, and still is the lawful owner in fee simple and entitled to the exclusive possession and enjoyment of lots No. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 39, 40, and 41, in block No. 15, in Stoddard's addition to said city of St. Louis, and within the corporate limits of said city. That on the said seventh day of August, A. D. 1858, Oliver D. Filley was mayor of said city of St. Louis, and in his said capacity, at the instance of the defendant, the said city of St. Louis, and as the servant and instrument of the defendant and by its authority and assuming to act in that behalf in accordance with the said pretended ordinances of said city, and in conformity with the charter of said city, and for the purpose opening a street called "Wash street" from Pratt avenue to the St. Charles
9 road, within the limits of said city, he, the said Oliver D. Filley, issued a certain notice in the words and figures following :

City of St. Louis
against
Peter Richard Kenrick, Philemon B. Ewing, Henry Stoddard, John J. Wilshusen, Alexander McLagan, Hiram Shaw, defendants.

Before the mayor of the city of St. Louis, sitting in the hall of aldermen in the City Hall.

Proceedings to open Wash street from Pratt avenue to the St. Charles road, as established by virtue of ordinances, number 4,053 and 4,102.

The above-named defendants, and all others interested in the property to be taken and the improvements to be made as above indicated, and all persons whose property will be benefitted by the proposed improvements, are hereby notified that proceedings will be had by the city of St. Louis in accordance with the amended city charter, approved Feb'y 23d, 1853, and an act amendatory thereof, approved March 5th, 1855, and also city ordinances Nos. 3,477, at the City Hall, in the city of St. Louis, on the 20th day of September, A. D. 1858, commencing at ten o'clock a. m. of said day and continuing from day to day till final judgment is rendered, for the purpose of condemning private property, in order to open Wash street westwardly from Pratt avenue to St. Charles road, as established by ordinances numbers 4,053 and 4,102, amendatory thereof, when damages and benefits will be assessed against and for said city, and also against and for all persons whose property is benefitted or taken by said Wash street being opened as aforesaid.

Given under my hand, at the city of St. Louis, this seventh day of August, A. D. 1858.

[L. s.] (Signed) O. D. FILLEY, *Mayor.*

Attest : J. G. Harper, *City Register.*

To which said notice was annexed and issued therewith by the said mayor his certain writ in the words and figures following, viz :

The State of Missouri to Peter Richard Kenrick and others named in the annexed notice, greeting :

You are hereby summoned and notified to appear before the mayor
10 of the city of St. Louis on the 20th day of September, 1858, in the hall of the board of aldermen in the city of St. Louis, then and there

to show cause why the city of St. Louis should not proceed to Wash street as set forth in the annexed notice.

Witness Oliver D. Filley, mayor of the city of St. Louis, this 7th day of August, in the year 1858.

[L. S.] (Signed) O. D. FILLEY, *Mayor.*

Attest: J. G. HARPER, *Register.*

Which said writ and notice were by the said mayor delivered to the marshal of said city to be served on the parties defendants therein named.

And your orator states and shows further that such proceedings were had by and in the name of the defendant, the said city of St. Louis, and by the said mayor, and against your orator and others under and in pursuance of said writ and notice, that a jury of twelve men were empanneled and sworn at the instance of said defendant, the said city of St. Louis, to assess the damages and benefits against and for said city, and against and for all persons whose property was benefitted or taken by said Wash street being opened as aforesaid; and that afterwards, to wit, on the 29th day of September, A. D. 1858, the said jurors made and rendered their verdict in that behalf, in so far as regards your orator as a party interested therein, in substance and to the effect following, namely:

That in order to open said Wash street as aforesaid it will be necessary to take a parcel of ground belonging to Philemon B. Ewing, (your orator,) described as follows: having a front of 34 feet 3 inches on the west side of Elliott avenue, by depth westwardly of 130 in depth, being the whole of lot 38, in blocks 15 of Stoddard addition, and 9 feet and 3 inches in front, by 130 feet deep from off the northern part of lot 39 in said block of said addition, being bounded as follows: east by Elliott avenue, north by Henry Stoddard, west by an alley, and south by the south line of proposed Wash street; the actual value of said lot of ground proposed to be taken, without reference to the proposed improvement, was by said jury found to be the sum
11 of one thousand and twenty seven dollars and fifty cents, ($1,027 50.)

Also that in order to open said Wash street as aforesaid it will be necessary to take two other parcels of ground, also belonging to said Philemon B. Ewing, (your orator,) described as follows: first lot being a parcel of ground from off the northern part of lots 11, 12, 13, 14, 15, 16, and 17, of block 15, of Stoddard's, and more particularly described as follows: beginning at a point in the east line of Clay avenue where the south line of proposed Wash street intersects the east line of said avenue, being 62 feet 5 inches north of Franklin avenue; thence eastwardly, with the south line of proposed Wash street to a point where being produced it intersects the south line of an alley in said block; thence westwardly, with the south line of said alley, to a point where the north line of said proposed Wash street will intersect said alley; thence westwardly, with the north line of proposed Wash street, to its intersection of the east line of Clay avenue; thence southwardly, along the east line of said avenue, 60 feet to the point of beginning. The second lot is described as follows: beginning at a point in said block 15, being part of lot 41 in said block, in Stoddard's addition, where the north line of said proposed Wash street will intersect the north line of the alley last herein above described; thence eastwardly, with said north line of proposed Wash street, to a point where it intersects the west line of the alley which runs north and south in said block 15; thence southwardly, with the west line of said alley, to a point where the south line of proposed Wash street will intersect the same; thence westwardly, with said south line of proposed Wash street, to a point where it intersects another alley in said block 15, running east and west in said block; the actual value of which said two lots of ground last described, without reference to the proposed improvement,

was by said jury found to be the sum of five thousand eight hundred and twenty-five dollars, ($5,825 00.)

And said jury, by their said verdict, found that the actual value of
12 the entire ground necessary to be taken for the purpose of opening said Wash street as proposed, amounted to the gross sum of eighteen thousand four hundred and ninety-two dollars, ($18,492,) and for the payment thereof they assessed the sum of one hundred dollars ($100) against said city of St. Louis, as the value to the public generally of the proposed improvement; and the balance thereof, to wit, eighteen thousand three hundred and ninety-two dollars, ($18,392,) they assessed against the owners of property fronting on said proposed Wash street, and of the property so benefited, according to the value of the property so assessed and in the proportion that the owners thereof are respectively benefited by the proposed improvement. And in so assessing your orator avers, and shows, and charges that there was and is assessed by the said verdict of said jury against your orator for supposed and pretended benefits to accrue to him as the owner of property by the opening of said proposed Wash street, as follows:

No. 37. As owner of lots 39 and 40, block 15, Stoddard's addition, front Elliott avenue; 57 feet front, 130 feet deep, bounded north by Wash street, east by Elliott avenue south by alley, west by alley, the sum of $1,227 50.
No. 38 .As owner of block 15, Stoddard's addition, fronting on Wash street; 292 feet front by 50 feet deep; bounded north by alley, east by alley, south by proposed Wash street, west by Clay avenue, the sum of $3,383 04.
No. 39. Fronting on Franklin avenue; 334 feet front by 625-140 feet in depth; bounded north by proposed Wash street, east by Stoddard, south by Franklin avenue, west by Clay avenue, the sum of $3,383 04.

Your orator further shows and avers that after the rendition of said verdict by said jury an entry thereof was made or caused to be made by the said mayor upon the docket or journal of proceedings in that behalf, kept by or at the instance of the mayor, but at what time in particular the same
was so entered your orator is not advised; nor is he advised that
13 said verdict was at any time set aside by the mayor; but the same was, as your orator is advised and believes, by the mayor within four months after the rendition thereof reported to the council of said city, and that within three months thereof an appropriation was made, to wit, on the 9th day of November, A. D. 1858, by ordinance by the council, to pay the said sum of one hundred dollars assessed by the jury as aforesaid against said city. But your orator avers and charges that the said mayor did not at any time within twenty days after said council made said appropriation, render judgment in favor of the defendant, the said city of St. Louis, against your orator, charged by the verdict of the jury, as aforesaid, for the payment of the damages or sums assessed as aforesaid against him, by said verdict, for benefits.

And your orator further particularly avers and charges that the said mayor was not vested in law, at any time, with power and authority to give or render any such judgment against him at any time, and that he was not by any ordinance of said council or by any provision of law vested with any color or pretence of authority to render any such judgment at any time after the expiration of the period of twenty days after the making of the appropriation aforesaid by the council as aforesaid. Nevertheless, your orator charges that at some time long after the expiration of said period of twenty days after the making of said appropriation, but at what particular date your orator is not advised, there was written upon the journal or docket of proceedings of said mayor, where the same still remains and appears, an entry in the words and figures following, to wit:

"In the matter of opening Wash street westwardly from Pratt avenue to the St. Charles road.

"And now, on the 20th day of November, 1858, the city council having on the 9th day of November, 1858, confirmed the award of the jury in the matter of opening Wash street westwardly from Pratt avenue to the St. Charles road, and made an appropriation to pay the sum awarded by said verdict against the city of St. Louis, it is therefore ordered, adjudged, and decreed that the city of St. Louis do recover of the said parties and of the
14 said property set forth and described in said verdict the several sums and amounts assessed and allowed by way of benefits in said verdict on account of opening Wash street as aforesaid, in manner and form following, to wit, (so far as regards your orator:)

"No. 37. That the city of St. Louis do recover of Philemon B. Ewing, (your orator,) in respect of a lot of ground in block 15, in Stoddard's addition, fronting 57 feet on Elliott avenue, bounded on the north by Wash street, east by Elliott avenue, south by alley, and west by alley, the sum of twelve hundred and twenty-seven dollars and fifty cents damages by way of benefits, and one dollar and twenty-five cents costs, and have execution thereof.

"No 38. That the city of St. Louis do recover of Philemon B. Ewing, (your orator,) in respect of a lot of ground in block 15 Stoddard's addition, fronting on Wash street, 292 feet front by 50 feet deep; bounded north by alley, east by alley, south by proposed Wash street, west by Clay avenue, the sum of three thousand three hundred and eighty-three dollars and four cents ($3,383 04) damages by way of benefits, and one dollar and 25 cents costs, and have execution therefor.

"No. 39. That the city of St. Louis do recover of Philemon B. Ewing, (your orator,) in respect of a lot of ground in block 15, 334 feet fronting on Franklin avenue, by 625-140 feet in depth, bounded north by proposed Wash street, east by Stoddard, south by Franklin avenue, west by Clay avenue, the sum of three thousand three hundred and eighty-three dollars and four cents ($3,383 04) damages by way of benefits, and one dollar and 25 cts. costs, and have execution therefor."

That at the end or foot of said entry on said docket or journal is subscribed the name of the said O. D. Filley, the said mayor. And your orator is advised and charges that the said entry so appearing, although, for reasons in this his bill of complaint to be set forth more fully and at large, of no legal validity and effect, nevertheless tends to and does materially injure and prejudice your orator, and this the more especially because your orator charges and avers that the defendant, the said city of St. Louis, by its officers and
15 agents gives it out in speeches, claims and insists that the said entry is in legal effect a judicial judgment, and as such, conclusive evidence of an indebtedness against your orator in behalf of and to said defendant, and that the said several parcels of property in said entry specified and referred unto as being benefitted by the opening of said Wash street, and in reference to which said assessments were made, are severally bound as by judgment lien for the payment of said alleged indebtedness, and that the said defendant by its said officers and agents threaten to sue out execution upon said alleged and pretended recovery, as upon judgments at law, and by virtue thereof to sell and dispose of said property and thereby to wholly deprive your orator thereof. That by reason of the premises your orator is greatly injured and prejudiced in the use and enjoyment of his said property and is hindered and prevented from selling and disposing thereof by reason of the cloud cast upon his title thereto and upon his right to hold and dispose thereof free and unincumbered by said pretended lien.

And your orator avers and charges that both the said verdict and pretended judgment founded thereon against your orator in behalf of the defend-

ant are invalid and ineffectual in law, either to deprive him of his right to the use and enjoyment of his said property thereby attempted to be appropriated to the public use in establishing and opening said Wash street, or to raise against him any indebtedness for supposed benefits to his said other property accrueing by the establishing and opening of said street, or to create a lien therefor upon his said other property for the reasons following, that is to say: The said defendant, the city of St. Louis, is a municipal corporation existing by virtue of the constitution and laws of the State of Missouri, and is not vested with any corporate power or any right of eminent domain, save only such as is conferred upon it by statutory law of said State, enacted and conferred in conformity with the constitution
16 thereof. That at the time of the institution of the said proceedings on the part of said city, before and by its said mayor, against your orator herein above mentioned, for the establishment of the said proposed Wash street, the only legislative enactments in force conferring the power to appropriate private property to such uses by said city were contained in an act entitled "An act to amend an act entitled 'An act to reduce the law incorporating the city of St. Louis and the several acts amendatory thereof into one act and to amend the same,' approved March 3d, eighteen hundred and fifty-one," approved February 23d, 1853, and in an act entitled "An act to amend the city charter of the city of St. Louis," approved March 5th, 1855, being the same acts referred to in the said proceedings as in accordance with which they were being had. Exemplifications of which said acts, under the seal of the State of Missouri, your orator will exhibit to the court as may be required at the hearing of this cause. That in so far as the same are material in this behalf the provisions of the said act approved February 23d, 1853, are as follows:

"ARTICLE VI.—*Of opening and improving streets.*

* * * * * * * * * *

SEC. 2. Whenever the city council shall provide by ordinance for establishing, opening, widening, or altering any street, lane, avenue, alley, wharf, or public square, and it becomes necessary for that purpose to take private property, and no agreement can be made with the owner or owners thereof, just compensation shall be made therefor to the person or persons whose property is so taken, which the mayor shall cause to be ascertained by a jury of twelve disinterested freeholders of the city, the particulars of which proceeding shall be prescribed by ordinance.

"SEC. 3. The mayor shall appoint a day for empanneling a jury and ascertaining the damages, at least sixty days' notice of which shall be given to the persons whose property is proposed to be taken; and if any of the owners thereof are unknown, cannot be found by the marshal of the city, or [are] absent from the city, (and the return of the marshal shall be conclusive as to the facts therein stated,) publication thereof shall be made in at
17 least two of the city daily newspapers for at least four weeks before the day appointed, notifying all owners and others interested in the property proposed to be taken and in the improvements to be made that on the day therein named the mayor will cause the property therein described to be condemned for public use, as an alley, street, lane, avenue, wharf, or square, as the case may be, and damages to be assessed therefor as herein provided; and such notice by publication as aforesaid shall be binding upon all persons whatsoever having any interest in any property that may be charged by the verdict of the jury with the payment of any portion of the damages in consideration of benefits to be derived by them.

"SEC. 4. It shall be the duty of the jury, first, to ascertain the actual value of the land proposed to be taken for the opening, widening, or altering of a lane, alley, street, avenue, wharf, or public square, without reference to the proposed improvement; then for the payment of such sum, to assess against the city the value to the public generally of the proposed improvement, and to assess the balance against the owner or owners of the property fronting on such lane, alley, street, avenue, wharf, or square, and in the blocks next adjacent on either side or end thereof, according to the value of the property so assessed and in the proportion that the owners thereof may be respectively benefitted by the proposed improvement; and the sum or sums to be paid by the owner or owners of property respectively benefitted by the improvements, as ascertained by the jury, shall be a lien or liens upon the property so charged, and shall be collected as provided by ordinance. The verdict shall be signed by each juror and delivered to the mayor.

"SEC. 6. If the verdict of the jury is not set aside by the mayor, it shall be his duty within four months to report the same to the council; and if an appropriation by the council within three months thereafter to pay the sum or sums awarded to be paid by the city, it shall then be lawful for the city to take possession of the ground so condemned to public use."

18 That so far as material in this behalf the provisions of the said act approved March 5th, 1855, are as follows:

"SEC. 1. That clause four (4) of section two (2) of the amended city charter of the city of St. Louis, approved February 23d, 1853, be amended by striking out the words "and in the blocks adjacent on either side thereof," and insert the following; "and of the property benefitted." Also that by the 8th section of an act of the general assembly, entitled "An act supplementary to the several acts to incorporate the city of St. Louis," approved on the 5th day of March, 1855, it is enacted: "That the city councils shall cause all publications made by authority of the city, to be inserted in the first columns of the first page of the newspapers doing the city printing."

And your orator avers that all of the said provisions of law remained and were in force at the time said proceedings above referred to were had before the mayor, and so far as consistent with the constitution of the State, were of binding obligation, and necessary to have been observed and conformed to in that behalf.

Your orator further shows that on the 12th day of December, A. D. 1855, the city council of said city of St. Louis enacted and ordained a certain ordinance, being the same referred to in said proceedings as "No. 3477," whereby it was and is so far as material to the present case ordained as follows:

"SEC. 1. Whenever the city council shall order the opening, widening, or altering of any street, avenue, lane, alley, wharf, or public square, and it is necessary to take private property for the same, the engineer shall survey and make a plat of the property, showing the names of the owners and the amount of front feet owned by each on the street, &c., proposed to be established; also the names of persons owning property, and the amount of front feet owned by each who are likely to be benefitted thereby.

"SEC. 2. Upon completion of the plats, the mayor shall forthwith

19 proceed to cause the said property to be condemned according to the provisions of the second section of the act of the general assembly of the State of Missouri, entitled 'An act to amend the act entitled "An act to reduce the law incorporating the city of St. Louis, and the several acts amendatory thereof into one act, and to amend the same,"' approved February 23d, 1853, as amended by the act of assembly entitled 'An act to amend the city charter of the city of St. Louis,' approved March 5th, 1855; and in so doing, all notices, subpœnas, veneries, and attachments on behalf of the city and other parties interested in the proceedings, shall be issued

by the mayor and signed by him, and attested by the city register, under the seal of the city, and shall be served and returned by the city marshal as in cases of process issued from the recorder's court.

"Sec. 3. The jury shall be sworn by the mayor or city register faithfully and impartially to discharge the duty imposed upon them by the second section of an act entitled 'An act to amend an act entitled "An act to reduce the law incorporating the city of St. Louis and the several acts amendatory thereof into one act, and to amend the same,"' approved February 23d, 1853, as amended by the act of the general assembly of the State of Missouri entitled 'An act to amend the city charter of the city of St. Louis,' approved March 5th, 1855.

"Sec. 4. The jury shall be empannelled in the hall of the board of alderman, where the evidence shall be heard on either side, and after hearing all the evidence and examining the ground to be taken, owned by persons to be charged with damages or compensation to be assessed, they shall return their verdict to the mayor.

"Sec. 5. Within twenty days after the council shall have made an appropriation awarded to be paid by the city by the verdict of the jury, it shall be the duty of the mayor to render judgment in favor of the city of St. Louis, against the parties charged by the verdict of the jury for the payment of the damages; and the city register shall issue executions therefor,
20 directed to the city marshal, whose duty it shall be to collect the same from the owner or owners of the property charged, in the same manner as executions are collected issued by the recorder.

"Sec. 6. If the execution shall not be paid within ten days after it shall come into the hands of the marshal, it shall be his duty to advertise and sell the property charged in the execution, in the manner prescribed for the sale of real estate under execution by an act of the general assembly of the State of Missouri, entitled 'An act to regulate executions,' approved March 26, 1845.

"Sec. 7. It shall be the duty of the marshal to make a deed to the purchaser, which shall be acknowledged by the marshal before the mayor, reciting the execution, time and place of sale, the name of the purchaser, and the amount of the bid, which deed shall vest in the purchaser an absolute estate in fee simple to the property named in the execution."

And your orator avers that the said several provisions of said ordinance remained in force at the time said proceedings were had before the mayor, and were of binding obligation, and necessary to have been observed and conformed to in that behalf.

And your orator further avers and charges that no personal service of any sort whatever was at any time made upon him of the said notice and the said writ thereto annexed, above referred to, pursuant to which the said jury was empannelled, and that he had not any knowledge or information touching the same or of the empannelling of the jury or other proceedings in that behalf, until after the rendition of said verdict and the writing upon the docket or journal of the said alleged and pretended judgment against him. And he further avers and says that he did not enter his appearance, or in any way appear to said proceedings in person, or by any other person by him thereunto authorized; yet he is advised that it is entered upon
21 the journal or record of said proceedings, as of several days and times during the pendency thereof, that the said Peter Richard Kenrick (a defendant in that behalf) appeared by his attorney, A. J. P. Garesche, and that the defendant, John Wilshusen and Henry Stoddard, appeared in their proper persons, and that the remaining defendants (including your orator) appeared by their attorney, Mr. Bakewell; and he avers that in so far as regards himself the said entry of appearance in his behalf, wheresoever and as

often as the same may be contained upon said journal or record, is untrue in fact, and is either fraudulent by intention or through mistake; that if made at the instance of any person by the name of Mr. Bakewell, it was wholly without authority of your orator, and is utterly void.

He further charges and avers that it is recited in the said journal or record of said proceedings that the mayor caused notice, on the 19th day of August, 1858, of said proceedings to be published "as by law required" in the Missouri Republican and in the Missouri Democrat, two daily newspapers printed in the city of St. Louis for 30 days, in each, consequently prior to the 21st day of September, 1858, a copy of which notice so alleged to have been published is set forth in said journal or record of proceedings—and it is also therein stated and set forth that on the 20th day of September, 1858, the plaintiff in that behalf (the said city of St. Louis) filed proof, satisfactory to the court, (the said mayor,) of the publication according to law of the notice, by publication in that behalf, and that on that day the jury by whom said verdict was rendered, as aforesaid, were duly elected, tried, and sworn. And true it is, as your orator believes and admits, that said jury was on that day empannelled and sworn, as in said journal or record of said proceedings is averred, but he avers and charges that it is not true that notice was given to him or published "according to law" or "as by law required" in that behalf, as in said journal or record is alleged
22 and set forth, because, he says: 1. That it doth not appear by said journal or record of proceedings that, as required by the 3d section of the said article VI as amended by the said act of assembly approved February 23d, 1853, above set forth, the mayor appointed a day for empannelling a jury for the purposes in said article VI provided, nor did he in fact appoint a day for that purpose. 2. That sixty days' notice of such appointment was not, as required by said 3d section, given to the persons (including your orator) whose property was proposed to be taken. 3. The notice, a copy of which is set forth as having been published as aforesaid, does not, as required by said 3d section, contain any description of the property of your orator or of any other proprietor's to be condemned, nor does it notify your orator or other proprietors that the mayor would on any day named in said notice cause any property therein described to be condemned for public use. 4. That notice as required by said 3d section was not published for at least four weeks before the day on which the jury was empannelled. 5. Nor was any notice published as required in the said amendatory act of May 5th, 1855, last above quoted and referred to, by being inserted in the first columns of the first page of the newspapers doing, at that time, the city printing. And for want of such notice your orator charges that the proceedings in that behalf had before the said mayor, including the verdict of the jury and the said pretended judgment of the mayor thereon, are as it regards your orator *corum non judice* and without legal validity. And he further charges that the same are of no validity and are void, because the provisions of the said 4th section of said article VI, as amended, as aforesaid, fixing the mode of compensation, are contrary to and inconsistent with the constitution of the State of Missouri in this: by section 7 of article XIII of the constitution it is provided "that no private property ought to be taken or applied to a public use without just compensation;" but no provision
23 is made by said act, or otherwise, securing such just compensation to the owners of property to be taken and condemned for public use by authority of said act. It directs that the value of the property to be taken shall be ascertained, in gross, by a jury without any regard to individual ownership thereof; and for the payment "of such sum," the jury are required to assess against the city the value to the public generally of the proposed improvement, in gross; but no provision is made for the payment

to anybody of such assessed value; and the balance of the value of the property to be taken after deducting the sum so to be assessed against the city, it is provided by the act, the jury are to assess against the owners of property fronting on the proposed improvement and other property benefitted, according to the value of the property so assessed and in the proportion that the owners thereof may be respectively benefitted by the proposed improvement; the same to be a lien on the property charged and be collected as provided by ordinance. But no provision is made for payment to the owners of the property taken or condemned of any compensation therefor. The assessments, it is provided, shall be collected as provided by ordinance; but no provision is made, either by the act, or by any ordinance, for the payment of the fund when collected, to anybody, and no remedy is provided in behalf of the individuals whose property is taken to secure them the benefit of said fund in compensation for their property. On the contrary, said ordinance No. 3477, above referred to, which is the only ordinance on the subject, provides that judgments shall be rendered in favor of the city of St. Louis, against the parties charged by the verdict of the jury for the payment of the damages, the result being, in so far as regards the funds so assessed and collected, that they pass into the coffers of the city, subject to no declared use; and the property condemned and taken
24 for the public use remains uncompensated for to the owners, and they left without remedy, except such as exists at common law or in equity, to recover the value thereof against the city.

Your orator further charges that if the said assessments against the property benefitted by the proposed improvement were in any legal way appropriated so as to be applied in payment to the owners of the property taken or condemned to the public use, the provisions of said enactment are nevertheless unconstitutional and void as against the owners of the property to be assessed, the effect of which is to impose upon said owners the obligation (if they are bound thereby) to contribute to the payment for the property taken or condemned an amount other than and different from the value of benefits to be realized by them arising from the proposed improvement, and may be in access of such benefits; no provision being made by said enactment requiring the jury to ascertain the value of such benefits accruing to the respective owners of the property assessed.

And your orator further avers that said pretended judgment against your orator is void in law, for the reason that no judicial power is, by any act of the general assembly, conferred upon the mayor for any such purpose, nor is there, by any such act, any power or authority given to the said municipal corporation of the city of St. Louis to confer any such judicial power upon its mayor.

Your orator further charges and avers that the said verdict of said jury, judgment of the mayor, and all and singular the said proceedings in that behalf had, commenced, and proceeded in before the mayor have become and are void, because that part of the said act of assembly approved February 23d, 1853, hereinbefore recited and set forth, relating to the appropriation of private property and assessments for benefits, and in virtue of
25 which said proceedings were had, and in progress of being had before the mayor, was, before the completion of said proceedings, repealed, absolutely and without any savings, by the 28th section of a certain other act of assembly, entitled "An act amendatory of and supplementary to the several acts incorporating the city of St. Louis," approved March 14th, 1859; which said section is in the words and figures following:

"SEC. 28. All acts and parts of acts inconsistent with and repugnant to this act are hereby repealed. This act to take effect and be in force from and after the passage thereof."

That the part of said act approved February 23d, 1853, hereinbefore recited and set forth, being inconsistent with and repugnant to the 16th section of the act aforesaid approved March 14, 1859, is by virtue of said section 28 of said last-named act repealed thereby, the said 16th section of said act being in the words and figures following:

"SEC. 16. Whenever the mayor and board of council shall, by ordinance, establish, open, widen, or alter any street, lane, avenue, alley, wharf, or public square, and it becomes necessary for that purpose to take private property, and no agreement can be made with the owner thereof, the corporation shall make a just compensation therefor to the person whose property is so taken, the amount whereof shall be ascertained as follows, to wit: The mayor shall petition the circuit court of St. Louis County, in term time, or the judge thereof in vacation, setting forth in his petition the particular description of the property sought to be condemned for public use, and, so far as known, the name or names of the owners or claimants thereof, and stating for what purpose the said private property is sought to be condemned; whether for establishing, opening, widening, or altering a street, lane, avenue, alley, wharf, or public square, and praying the court or judge to cause damages to be assessed; on the presentation of which petition it shall be the duty of the court in term time, or the judge in vacation, to cause the clerk to issue a precept to the sheriff, requiring him to summon twelve disinterested freeholders of the city, who shall attend at the court-
26 house, at a time to be specified in the precept, not less than five nor more than twenty days from the date thereof, and who shall be sworn diligently to enquire and a true assessment to make of the damages to be suffered by the owners of the property in question, and a true verdict to render according to the law and the testimony. It shall be the duty of the mayor, at least three days before said petition is presented, to cause a notice in writing to be served on each of the owners, if known, of the property sought to be condemned, stating the time and place at which said petition will be presented. If the owners, or any part of them, are not known to the mayor, he shall cause such notice to be published in at least two daily newspapers printed in the city of St. Louis, which notice shall be published at least six days before said petition is presented. In vacation it shall be the duty of the judge to attend at the time designated for such inquest, together with the clerk of said court, and the judge shall preside at the same and shall cause a record to be made of the said proceedings. Either party may except to any ruling of the judge or court, as in ordinary trials, and may in like manner appeal from his decision to the supreme court. Continuances to a day, not more than twenty days distant, or new trials, may be granted for good cause, as in other actions; and the proceedings, as near as may be, shall conform to the proceedings in ordinary suits. Judgment shall be entered against the city in favor of the several owners respectively for the damages assessed by the jury, upon which judgment execution shall issue, as in other cases, at the end of ninety days from the date of the judgment. The officers of the court shall be entitled to the same fees as for the like services in other cases."

Your orator further charges and avers that the said defendant, the city of St. Louis, having, as hereinbefore set forth, through the instrumentality of its mayor and other corporate officers, and said jury, and the proceedings in that behalf (a copy of all which your orator prays the said defendant may be required to exhibit and set forth with its answer in this behalf)
27 assumed to condemn to said public use the property of your orator hereinbefore particularly designated, and did afterwards, in fact, in pursuance of said assumed condemnation, enter upon and into and seized and took possession of said property of your orator without his consent and against

his will, and yet retains and holds the same to the exclusion of your orator, having made and constructed thereon, in connection with other property, the said street called Wash street, extending westwardly from Pratt avenue to the St. Charles road, which said Wash street was and is established by the said ordinances No. 4,053 and 4,102, hereinbefore referred to, and has been and is in fact opened and in use in such way and manner, so long as the same shall remain, as to wholly deprive your orator from making any private use thereof; and said street is in its nature and purposes and use a public highway, intended to be of permanent and perpetual duration; and he charges that no compensation whatever has been made to him by said city for his said property so taken and appropriated by said city, and he is advised that he is without any adequate remedy to obtain compensation therefor and to injoin proceedings against him by execution according to the ordinances aforesaid in that behalf of the said pretended judgment so entered against him as aforesaid by said mayor, except by the friendly aid of this honorable court in chancery sitting. And he avers that his said property, so taken and appropriated by the defendant as aforesaid, excedes the sum of eight thousand four hundred and sixty dollars, being, by the verdict of the jury aforesaid, in fact valued at the sum of $8,464 50, and that in addition to the value thereof, as of the date of the appropriation and seizure thereof, he is justly entitled to recover against the defendant interest upon such value from the date of such appropriation and seizure until payment shall be made to him therefor. Your orator being without remedy in the premises save as aforesaid, prays process of subpœna against said defendant and that it be compelled and required, under its corporate seal, true, direct, and perfect answers to
28 make to all and singular the allegations and charges in this your ortor's amended bill of complaint contained, and that as fully and particularly as if it were thereunto here again interrogated, and particularly—

1. Whether proceedings were not had by and on behalf of the said defendant before said mayor and against your orator and others, as hereinbefore averred, in reference to the condemnation of property for the use of Wash street and for the assessment of damages for benefits, &c., and that the defendant exhibit, with its answer to this interrogatory, if not otherwise, a full and true copy of all of such proceedings, including all orders of the city council for establishing and opening said Wash street, and including the said ordinances 4,053 and 4,102.

2. Whether the corporate powers of the city at the time of said proceedings in reference to the subject matter in question were not, as in this bill of complaint charged and set forth; or if other and different, in what respect, and that all other provisions of law in that regard be set forth or referred unto.

3 Whether the provisions of the said ordinance No. 3,477 in relation to the subject matter, are not truly and fully set forth herein as above; or, if otherwise, in what particulars, and whether the said provisions of said ordinance, so set forth, are not all of the provisions by ordinance which, at the time in question, were in force having any material bearing upon the subject matter in question; or, if there are other such material provisions, that the same be set forth or referred unto.

4. Whether any judicial power or authority is conferred by law upon the mayor, giving him jurisdiction to render judgment in matters and cases including the subject matter in question, and in reference to which he has assumed to render judgment against your orator, as herein stated and averred; or whether any power is conferred by law upon said municipal corporation to vest in said mayor such judicial power and jurisdiction, and if any such be alleged or claimed, that the same be set forth or referred unto.

29 Whether your orator in person, or by any agent or attorney by him thereunto duly authorized, appeared to said proceedings before the mayor; or whether he had any knowledge whatever of the pendency thereof previous to the rendition of the verdict by the jury. And if any such appearance or knowledge be asserted or pretended, that all facts in relation thereto be specifically set forth, with the evidence of any power or authority, if any such be pretended, to any agent or attorney to appear for him, and especially to the said Mr. Bakewell, in said proceedings.

6. Whether any notice was published in the newspapers of the pendency of said proceedings before the mayor than that, a copy of which is inserted in the journal or record of said proceedings, and that the particulars of the publication of said notice, so exhibited by copy, be specifically stated and set forth in answer to this interrogatory, and especially in what newspapers; whether said newspapers were those doing the city printing at the time; whether the same were inserted in the first columns of the first page of such papers, or if otherwise in any of these respects, that the particulars thereof be stated; on what days in each of the newspapers severally such notice was first published; on what days consecutively the same were published; and on what days in particular the last publication in each paper was issued, and whether any alteration in the terms of any of said notices was made in the course of the publication thereof, and if so, in what particulars.

7. Whether the appropriation for the payment of the said sum of $100, made by the jury, was not made by the city council on the 9th day of November, A. D. 1858, or if not on that day, on what other day was it made.

8. Whether the entry of the said judgment upon the docket or journal of the mayor was not in fact made after the expiration of twenty days after the council made the said appropriation, or if otherwise, when in particular was the same in fact entered? and was not the signature of the mayor evi-
30 dencing his official act in the rendition of said judgment attached to said entry long after or at some time after the expiration of twenty days after the making of said appropriation by the council? and whether said signature was not in fact so annexed after the commencement of this suit by the filing of the original bill of complaint therein.

9. Was not the said part of the act of assembly, approved February 23d, 1853, herein above set forth, repealed, as in this behalf above charged, before said proceedings were completed.

10. Whether the defendant, by its officers and agents, does not give it out in speeches and claim that the pretended judgment against your orator, so assumed to be rendered by the mayor, as aforesaid, is a valid evidence of indebtedness against him, subject to be enforced by execution and sale of the property against which the said assessments were made by the jury as provided by said ordinance No. 3,477, and whether it is not the purpose of the defendant, if not legally restrained from so doing, to proceed upon the same accordingly.

11. Whether the property of your orator in that behalf hereinbefore specified has not been in fact seized and occupied by the defendant in the opening and constructing of said Wash street; whether such seizure and occupancy thereof is not of a permanent and perpetually enduring kind; whether your orator is not thereby prevented from making any private or individual use thereof; and whether the reasonable value thereof at the time of said seizure and occupancy was not as hereinabove charged and set forth.

In tender consideration of all which premises your orator prays—

1st. That the defendant be perpetually and forever injoined from in any way or manner proceeding by execution on said alleged and pretended judgments, rendered against him by the mayor, to make sale of the said property against which the said assessments were made by the jury, or otherwise howsoever for the purpose of enforcing satisfaction of said judgments.

31 2d. That said assumed and pretended judgments, and the said verdict of the jury upon which the same were predicated, be adjudged to be null and void in law.

3d. That an account be taken of the just and true value of the said property of your orator seized by the defendant as aforesaid and appropriated in the opening and constructing of said Wash street as aforesaid, as of the time of said seizure and appropriation, with interest thereon; and that the defendant be adjudged and decreed to pay to your orator the said just and true value, with interest thereon from the date of said seizure and appropriation till the same shall be paid; and

4th. That such other and further relief as may be equitable in the premises be granted to your orator.

And your orator will, &c.

(Signed) BRITTON A. HILL, *of Counsel for Pl'ff.*
(Signed) H. H. HUNTER.
(Signed) E. SHERMAN.

And on Monday, the 13th day of April, A. D. 1863, the following order was made, to wit:

PHILEMON B. EWING, complainant,
ag'st
THE CITY OF ST. LOUIS, defendant. } In chancery.

This day comes the defendant, by solicitor, and files a demurrer to the bill of complaint herein; which demurrer is as follows:

Demurrer.

In the circuit court of the United States for the district of Missouri.

PHILEMON B. EWING
vs.
THE CITY OF ST. LOUIS. } In equity.

The defendant by protestation, not acknowledging or confessing all or any of the matters or things in said bill contained to be true as therein set forth, does demur in law to said bill, and for causes of demurrer assigns the following:

That said complainant hath not in his said bill made such a case as entitles him to any relief from or against this defendant touching the matters contained in said bill, or any such matters as are there set forth; that said bill does not contain facts constituting or giving to complainant any
32 equitable cause of action, or coming within the equity powers of this court; that on the contrary, it doth appear from said bill and from the matters there set forth that this court as a court of equity has no jurisdiction or authority to take cognizance of any such matters as those described and complained of in complainant's bill; that it appears from said bill that said complainant has for his alleged grievances a plain, adequate, and complete remedy given him by law; that while the object of said bill appears to be to set aside as null and void or to enjoin or prevent the enforcement of certain proceedings and judgments in said bill described, yet said bill exhibits matters and alleges facts which show that the complainant is not entitled to any relief from a court of equity in respect to said proceedings and judgments, or anything done or to be done under them; that it is the object and purpose of said bill, as appears from its face, to have this court revise and control the official acts of a certain political body, to wit, the city of St.

Louis, and of its mayor and common council; that said bill sets forth certain proceedings and describes certain judgments done and rendered as is alleged under pretended authority of certain ordinances of the city of St. Louis, and that the said bill seeks in fact to have reviewed and set aside by this court, as a court having superintending control and power over such matters, the said proceedings and judgment.

Wherefore, and for divers other good causes, defendant demurs to said bill, and to all matters therein, and prays judgment of this court whether he shall be compelled to answer thereto, and to be hence dismissed with his reasonable costs.

(Signed) GEO. E. LEIGHTON, and
(Signed) C. S. HAYDEN, *for Defendant.*

I, C. S. Hayden, of counsel for the city of St. Louis, defendant in said action, do hereby certify that, in my opinion, the foregoing demurrer is well-founded in point of law.

(Signed) C. S. HAYDEN.

33 James Fortune, comptroller of the city of St. Louis, said defendant, and its agent in this behalf, being sworn, on his oath says that the foregoing demurrer is not interposed for delay.

(Signed) JAMES FORTUNE, *City Comptroller.*

Subscribed and sworn to before me this 13th day of April, A. D. 1863.

(Signed) BEN. F. HICKMAN, *Clerk.*

Demurrer submitted.

And on Thursday, the sixth day of October, A. D. 1864, the following order was made, to wit:

PHILEMON B. EWING, complainant,
ag'st
THE CITY OF ST. LOUIS, defendant. } In chancery.

This day come the parties, by solicitor, and by consent the questions of law arising upon the demurrer filed herein to the bill and amended bill of complainant in this cause are set down for argument on this day; and thereupon said questions were argued by said solicitor and submitted to the court for decision thereon.

Demurrer sustained, and decree.

And on Wednesday, the 12th day of October, A. D. 1864, the following order was made, to wit:

PHILEMON B. EWING, complainant,
ag'st
THE CITY OF ST. LOUIS, defendant. } In chancery.

This day come again the parties, by their solicitors, and the court having examined the questions of law arising upon the demurrer filed herein by defendant to the bill and amended bill of complainant, and being advised in the premises, do now order and decree that said demurrer be, and the same is hereby, sustained. And do further order, adjudge, and decree that said bill and amended bill of complainant be, and the same is hereby, dismissed for want of jurisdiction of the federal court as to the matters and things as set up therein. And do further order, adjudge, and decree that the complainant pay the costs of this suit, and that execution issue therefor.

Appeal granted.

34 And on Thursday, the 18th day of October, A. D. 1864, the following order was made, to wit:

PHILEMON B. EWING, complainant,
ag'st
THE CITY OF ST. LOUIS, defendant. } In chancery.

This day comes again the complainant, by his solicitor, and on his motion it is ordered that an appeal to the Supreme Court of the United States be allowed him from the decree rendered in this cause; and on his further motion ten days is allowed him to execute the appeal bond in the sum of five hundred dollars, with Eleazer Sherman as principal and Britton A. Hill as surety, for the costs to be incurred in consequence of the granting of such appeal, said bond to be executed before the clerk of this court; which appeal bond is as follows:

Appeal bond.

Circuit court of the United States for the 9th circuit and district of Missouri

PHILEMON B. EWING
ag'st
THE CITY OF ST. LOUIS. } Appeal.

Know all men by these presents that we, Eleazer Sherman as principal and Britton A. Hill as surety, are held and firmly bound unto the above-named city of St. Louis in the sum of eight hundred dollars, to be paid to the said city of St. Louis, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and each of our heirs, executors, and administrators, fully by these presents. Sealed with our seals, and dated this twenty-first day of October, A. D. 1864.

Whereas the above-named plaintiffs hath taken an appeal to the Supreme Court of the United States from the judgment rendered in the above-entitled suit by the circuit court of the United States for the 9th circuit:

35 Now, therefore, the condition of this obligation is such that if the above-named plaintiffs shall prosecute their said appeal to effect, and answer all costs if they shall fail to make good their appeal, then this obligation shall be void; otherwise, the same shall remain in full force and virtue.

(Signed) ELEAZER SHERMAN. [SEAL.]
(Signed) BRITTON A. HILL. [SEAL.]

Acknowledged before me by Eleazer Sherman and Britton A. Hill this 21st day of October, 1864.

(Signed) BEN. F. HICKMAN, *Clk C. C. U. S., Dis. Mo.*

UNITED STATES OF AMERICA, *ss:*

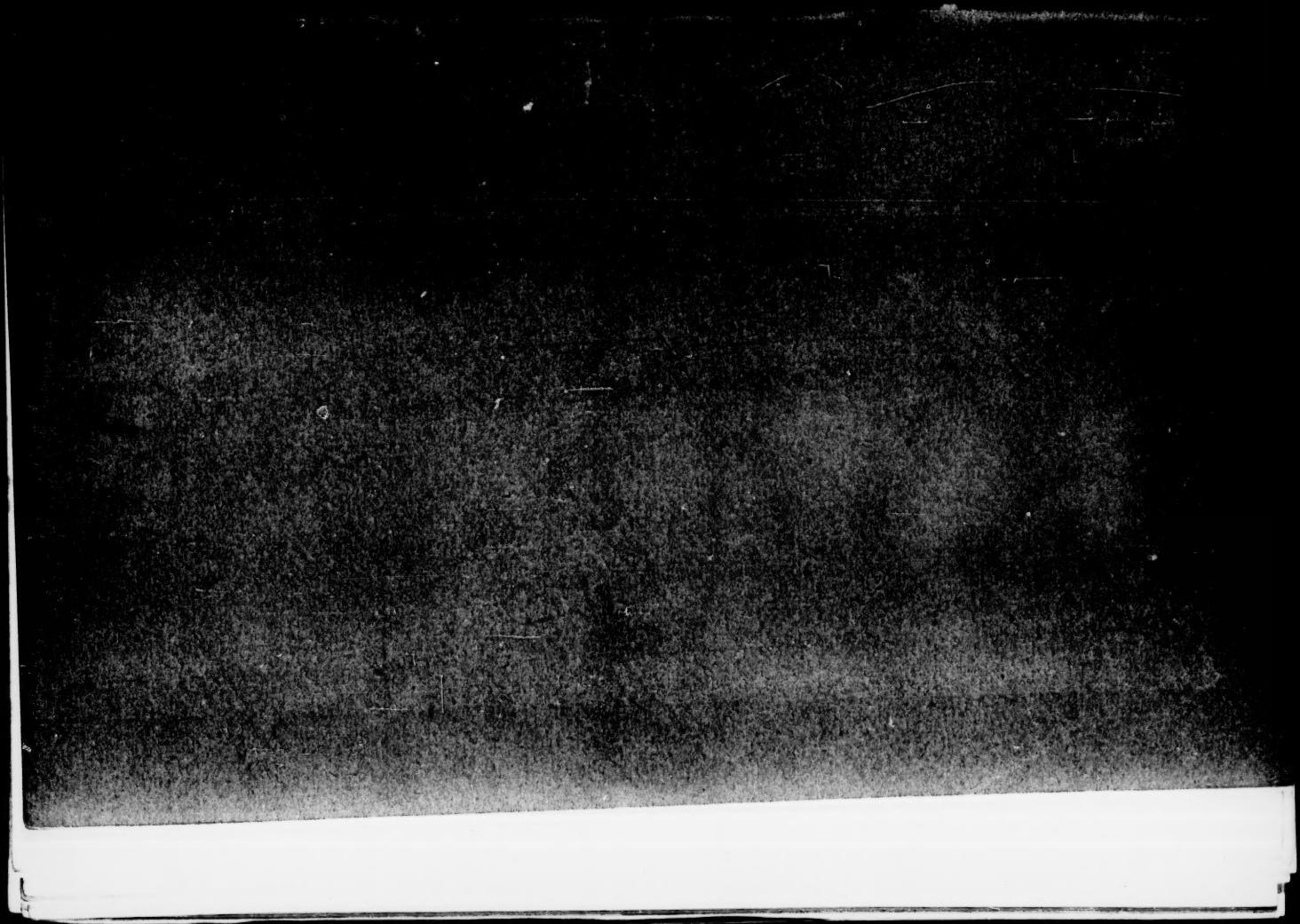
Circuit court for the districts of Missouri.

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a copy of the record and proceedings of said court in the chancery cause of Philemon B. Ewing against the city of St. Louis as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said districts, this 28th day of December, A. D. 1864.

[SEAL.] BEN. F. HICKMAN, *Clerk of said Court.*

Filed January 11, 1865.



Supreme Court of the United States.

PHILEMON B. EWING, APPELLANT,

vs.

THE CITY OF ST. LOUIS, APPELLEE.

ABSTRACT

AND

ARGUMENT FOR APPELLANT.

(On the question of equity jurisdiction see additional brief.)

~~Circuit~~ Court of the United States,

~~DISTRICT OF MISSOURI.~~

PHILEMON B. EWING,
vs.
THE CITY OF ST. LOUIS. } *In Chancery.*

ABSTRACT,

ON DEMURRER TO THE BILL OF COMPLAINT.

The relief prayed by the Bill is two-fold:

1. To enjoin proceedings before the Mayor to coerce payment of assessments for alleged benefits to arise from establishing Wash street, &c.

2, To obtain compensation for certain property of the complainant appropriated by the city for the use of said street.

Statement of case as made by the Bill.

FIRST.—After averring the complainant's ownership of certain lots in the city of St. Louis, the Bill alleges that the Mayor, at the instance of the city and as its servant and instrument, and by its authority, on the 7th day of August, 1858, issued a

certain notice, a copy of which is set forth in the Bill, to which was annexed a certain writ of summons, also issued by the Mayor, a copy of which is also set forth in the Bill, against the complainant and others as defendants named therein, addressed to the Marshal of said city—for the purpose, as indicated by the terms thereof, of notifying the complainant and said others named as defendants, of proceedings thereby instituted "*for the purpose of condemning private property in order to open Wash street;*" and summoning them to appear before the Mayor on the 20th day of September, 1858, in the Hall of the Board of Aldermen, to show cause why the said city should not proceed to open said street, &c.

That a jury of twelve men were empaneled and sworn at the instance of the defendant, the City of St. Louis, to assess the damages and benefits, against, and for, said city, and against, and for, all persons whose property was benefitted, or taken, by said Wash street being opened; and on the 29th day of September, 1858, said jurors made and returned their verdict in that behalf, in so far as regards the complainant, in substance and to the effect following, namely: That in order to open Wash street it would be necessary to take a parcel of land belonging to the complainant, (particularly described,) the actual value of which, without reference to the proposed improvement, was found to be $1,027 50; also, two other parcels, (described) the actual value of which was found to be $5,825 00; the jury also found that the entire value of the ground necessary to be taken for said purpose, including that above named of the complainant, was the sum of $18,492 00. To pay which the jury assessed against the city, $100 00, against the complainant as owner of certain blocks and lots, $7993,58, and the residue against other owners, $10,398 42, total, $18,492 00.

That said verdict was afterwards entered on the journal of said proceedings kept by the Mayor, and was not set aside, but was within four months after its rendition, reported by the Mayor to the City Council, and within three months thereafter, to-wit, on the 9th day of November, 1858, the City Council, by

ordinance, appropriated the sum of $100 to pay said assessment against the city; but that the Mayor did *not*, at any time within twenty days after said appropriation was made, render judgment in favor of said city against the complainant, for the said sums assessed against him as aforesaid, by the verdict of the jury.

That the Mayor was not vested in law with power and authority to render such judgment against him, at any time, and had not any color or pretence of authority by any ordinance or provision of law, to render any such judgment at any time after the expiration of twenty days after the appropriation was so made by the Council. Nevertheless, that at some long time after the expiration of twenty days thereafter, there was written upon the journal of proceedings of the Mayor, where the same still remains, an entry, set forth in the Bill in extenso, the substance of which is, that, "Now on the 20th day of November, 1858, the City Council having on the 9th day of November, 1858, confirmed the award of the jury in the matter of opening Wash street," etc. "and made an appropriation to pay the sum awarded by said verdict against the city. It is therefore ordered, adjudged and decreed that *the City* do recover of the said parties and of the said property set forth and described in said verdict, the several sums and amounts assessed and allowed by way of benefits in said verdict, on account of," etc. "in manner and form following, to-wit," etc. (reciting so far as regards the complainant, the substance of the verdict,) "amounting in the aggregate to the sum of $7,993 58 damages by way of benefits, and $1 25 costs, and have execution therefor." The name of O. D. Filley, Mayor, being subscribed at the foot of said entry upon said journal.

That said entry although of no legal validity, for reasons to be set forth, nevertheless tends to, and does materially injure and prejudice the complainant in this, that said city by its officers and agents, gives it out in speeches, and claims and insists, that said entry is, in legal effect, a judgment, and as such, is conclusive against the complainant as evidence of indebtedness,

to the amount therein set forth, to the said city; and that the several parcels of the complainant's property, in reference to which said assessments were made, are bound and liable for the payment of said alleged indebtedness, to be sold on execution, threatened to be issued in behalf of the city on said pretended judgment; by reason whereof the complainant is injured in the use and enjoyment of his said property, and hindered and prevented from selling and disposing thereof by reason of the cloud cast upon his title thereto, etc.

That both said verdict and judgment are invalid, void, and ineffectual in law, to deprive him of his said property, or to raise against him an indebtedness to said city, or otherwise, for the reasons following: Said city is a municipal corporation, existing as such by virtue of the Constitution and laws of the State of Missouri, and is not vested with any corporate power, or right of eminent domain, save only such as is conferred by statute, in conformity with the Constitution of the State. That at the time such proceedings were had the only legislative enactments conferring power to appropriate private property to such uses, were contained in an act entitled "*An Act to amend an Act entitled an Act to reduce the law incorporating the City of St. Louis, and the several acts amendatory thereof, into one act, and to amend the same, approved March 3d*, 1851," approved February 23, 1853; and an act entitled, "*An Act to amend the City Charter*," *etc.* approved March 5, 1855, being the same referred to in said proceedings, as in accordance with which they were had. (See Revised Ordinances of 1861, pp. 172, 176.)

That so far as material for present purposes the provisions of said act of February 23, 1853, are as follows as amended:

"ART. VI, SEC. 2. Whenever the City Council shall provide by ordinance for establishing, opening, widening or altering any street," etc. "and it becomes necessary for that purpose to take private property, and no agreement can be made with the owner or owners thereof, *just compensation shall be made therefor to the person or persons, whose property is so taken*, which the *Mayor* shall cause to be ascertained by a jury of twelve dis-

interested freeholders of the city, *the particulars of which proceeding* SHALL BE PRESCRIBED BY ORDINANCE."

"SEC. 3. The Mayor shall *appoint a day* for empaneling a jury, and ascertaining the damages, at least *sixty days* notice of which shall be given *to the persons whose property is proposed to be taken*, and if any owners thereof are unknown, can not be found by the Marshal, or are absent from the city, (and the return of the Marshal shall be conclusive as to the facts therein stated,) publication thereof shall be made in at least two of the city daily newspapers, for at least *four weeks* before the day appointed, notifying all owners and others interested in the property proposed to be taken, and in the improvements to be made, that, on the day therein named the *Mayor* will cause the property therein described, to be condemned for public use, as an alley, street," etc. "as the case may be; and damages to be assessed, therefor, as herein provided, and such notice by publication as aforesaid, shall be binding upon all persons whatsoever having any interest in any property that may be charged by the verdict of the jury with the payment of any portion of the damages, in consideration of benefits to be derived by them."

"SEC. 4." This section directs that the jury shall first ascertain the value of the land proposed to be taken, and then for the purpose of paying the same, shall assess against the city the value to the public generally, of the proposed improvement, and the balance against the owners of property benefited, "according to the value of the property so assessed, and in the proportion that the owners thereof, may, respectively, be benefited by the proposed improvement: and the sum or sums to be paid by the owner or owners of property respectively benefited by the improvement as ascertained by the jury, shall be a *lien*, or liens, upon the property so charged, *and shall be collected as provided by ordinance*."

"SEC. 6. If the verdict is not set aside by the Mayor, it shall be his duty within four months, to report the same to the Council, and if an appropriation is made by the Council within three months thereafter to pay the sum or sums awarded to be paid

by the city, it shall be lawful for the city to take possession of the ground condemned to public use."

That so far as material, the provisions of the act of March 5th, 1855, are as follows:

SEC. 1. Is an amendment of clause 4, of sec. 2, of the act of Feb. 23, 1853, above referred to, the effect of which is to subject all property *benefited by the proposed improvement*, to be assessed, etc.

SEC. 8. Provides that all publications made by authority of the city shall be inserted in the first columns of the first page of newspapers doing the city printing. (See Revised Ordinances, 1861, p. 178.)

That on the 12th day of November, 1855, an *ordinance* was enacted by the City Council, (referred to in said proceedings as No. 3477,) whereby so far as material to the present case, it was and is ordained:

"SEC. 1. Whenever the City Council shall order the opening," etc., "of any street, etc.", "and it is necessary to take private property for the same, the engineer shall survey and make a plat of the property, showing the names of the owners, and the amount of front feet owned by each on the street," etc. "proposed to be established; also the names of the persons owning property, and the amount of front feet owned by each, who are likely to be benefited thereby."

"SEC. 2. On completion of the plats, the Mayor shall forthwith proceed to cause the property to be condemned, according to the provisions of the second Section of Article VI, of the Act aforesaid, approved Feb. 23, 1853, as amended by the Act to amend the City Charter," etc. "approved March 5, 1855; and in so doing, all notices, subpœnas," etc., "are required to be issued by the Mayor, and to be signed by him, and attested by the City Register under the seal of the City, and shall be returned," etc., "as in cases of process issued by the Recorder's Court."

SECS. 3 and 4, provides in relation to the empaneling and

swearing of the jury, the hearing of testimony, and returning of their verdict, etc.

SEC. 5. Ordains that within twenty days after the City Council make an appropriation for the payment of the sum awarded to be paid by the City, the Mayor shall render judgment on the verdict in favor of the City and against the parties charged by the verdict, for the payment of the damages; and the City Register shall issue execution therefor, directed to the City Marshal, whose duty it shall be to collect the same from the owners of the property charged, in the same manner as executions are issued by the Recorder.

"Sec. 6. If the execution be not paid within ten days after it shall come into the hands of the Marshal it shall be his duty to advertise and sell the property charged in the execution, *in the manner prescribed for the sale of real estate* under execution by an act of the General Assembly of the State of Missouri, entitled 'An Act to regulate executions,' approved March 26, 1845."

"SEC. 7. It shall be the duty of the Marshal to make a deed to the purchaser, which shall be acknowledged by the Marshal before the Mayor, reciting the execution time and place of sale, the name of the purchaser, and the amount of the bid; which deed shall vest in the purchaser an absolute estate in fee simple to the property named in the execution," etc.

The bill of complaint avers and charges that no personal service of any sort was made upon the complainant, at any time,

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[NOTE. The command, according to the forms prescribed by ordinance, of executions issued by the Recorder, is, "to levy the said debt and costs of the goods and chattels of said defendant within the City of St. Louis, and expose the same to sale agreeably to law; and for want of sufficient property whereon to levy debt and costs, you are hereby commanded to take the body of the said defendant into your custody, and convey said defendant to the City Work House of the City of St. Louis; the keeper whereof is hereby commanded to receive said defendant, and said defendant to safely keep, until said debt and costs shall have been paid by said defendant's labor according to the laws of the State of Missouri, and the ordinance of the City of St. Louis, or until said defendant shall be otherwise discharged in due course of law." See Ordinance No. 4522. Sec. 43, page 566, of the Ordinances of the City of St. Louis, etc., 1861.]

of the said notice and the said writ thereto annexed, pursuant to which said jury was empaneled; and that he had not any knowledge or information touching the same, or of the empaneling the jury or other proceedings in that behalf, until after the rendition of said verdict and of said pretended judgment; that he did not enter his appearance, or in any way appear to said proceedings in person, or by any other person by him thereto authorized; yet he is advised that it is entered upon the journal or record of said proceedings, as of several days and times, that Peter Richard Kenrick, (a defendant in that behalf,) appeared by J. P. Garasche; and that John Welshusen and Henry Stoddard, (also defendants,) appeared in their proper persons, and that the "*remaining* defendants," (including the complainant) appeared "by their attorney, Mr. Bakewell:" and he avers that in so far as regards himself, the said entry of appearance in his, the complainant's behalf, whensoever and as often as the same may be contained upon said journal, or record, is untrue in fact, and is either by intentional fraud, or mistake. That if made at the instance of any person by the name of Mr. Bakewell, it was wholly without his authority and is utterly void.

That it is recited in the record of said proceedings that the Mayor caused notice thereof to be published in two newspapers, "*as by law required*" for thirty days, each, prior to the 21st day of September, 1858, (a copy of which is set forth in said record,) that on the 20th day of September, 1858, the City filed satisfactory proof with the Mayor of the publication of said notice according to law; that on that day the jury were duly elected, tried and sworn, etc.

The bill of complaint admits that the jury was, on that day, empaneled and sworn, but charges and avers that it is not true that said notice was, as to him, given or published "*according to law*" because:

1st. It does not appear by the record aforesaid that the Mayor appointed a day for empaneling a jury; nor did he in fact appoint a day for that purpose.

2d. That sixty days notice of said appointment was not, as

required by the 3d section of article 6, of the act of Feb. 23, 1863, given to the persons whose property was proposed to be taken—the complainant included.

3d. Said notice as set forth in said record, does not, as required by said 3d section, contain any description of the property of the complainant proposed to be condemned, nor does it notify him or the other proprietors that the Mayor would, on any day named in said notice, cause any property therein described to be condemned for public use.

4th. Said notice was not published, as required by said 3d section, for at least four weeks before the day on which the jury was empaneled.

5th. Nor was said notice published as required by the amendatory act of March 5, 1855, by being inserted in the *first column of the first page* of the newspaper at that time doing the city printing. That for want of said notice the said proceedings, including the verdict of the jury and said pretended judgment thereon, were *coram non judice*, and void as against the complainant.

The bill of complaint further avers that said proceedings are void because the said sec. 4 of article VI, of said act, approved Feb. 23, 1853, as amended, fixing the mode of compensation, is contrary to, and inconsistent with the Constitution of the State of Missouri in this: by section 7 of article XIII of the Constitution it is provided, "that no property ought to be taken or applied to a public use without just compensation;" but no provision of law is made by said act or otherwise, securing such just compensation *to the owners* of property to be condemned for public use by authority of said act. Also that the provisions of said enactment are void, as against the owners of the property *to be assessed*, for inconsistency with the Constitution.

That said pretended judgment against the complainant is void in law, because no judicial power is, by any act of the General Assembly, conferred upon the Mayor for any such purpose; nor is there by any such act, any power or authority given to the municipal corporation of said city to confer such judicial power

upon its Mayor; nor could such power be constitutionally conferred.

That all of said proceedings, including the verdict of the jury and pretended judgment thereon, have become and are void, because all of the provisions of said act of Feb. 23, 1853, upon which and the amendments thereto said proceedings were founded, have been, and are, unqualifiedly repealed by section 28 of 'an act amendatory of and supplementary to the several acts, incorporating the City of St. Louis," approved March 14, 1859, without any saving of the right and power to collect or enforce payment of assessments made pursuant thereto.

Upon the preceding allegation of the bill the complainant prays a perpetual injunction against execution being issued upon said pretended judgment or other proceedings against him to enforce payment thereof, and that the same be decreed to be null and void.

SECOND.—The bill further charges that the defendant the City of St. Louis, having through the instrumentality of its Mayor and other corporate officers, said jury and the proceedings in that behalf, (a copy of which the defendant is prayed to set forth with its answer,) assumed to condemn to said public use the property of the complainant in the preceding part of the bill designated, did afterwards, in fact, in pursuance of said assumed condemnation, enter upon, and seized and took possession of said property, without his consent and against his will, and retains and holds the same to his exclusion, having made and constructed thereon, in connection with other property, the said street called Wash street, extending from Pratt Avenue to the St. Charles Road, the same being established by ordinances No. 4053 and 4102 referred to in the bill, and being in fact opened and in use, in such way and manner, so long as the same shall remain, as to wholly deprive the complainant from making any private use thereof, the same being permanently constructed into a public highway as such. No compensation whatever has been made to him by said city therefor, and he is advised that he is without any adequate remedy to obtain a just

compensation therefor, except by the decree of this honorable court. That his said property so taken exceeds the sum of $6,952 00 in value, the same having been valued by the verdict of the jury at $6,952 50; in addition to which value the complainant is entitled to recover interest thereon from the date of seizure and appropriation till paid as damages.

The prayer for relief under this branch of the bill is for compensation in conformity with the allegations.

There is also a prayer for general relief.

ARGUMENT.

I. Several Constitutional questions are presented for consideration, which we propose to notice first in order.

SEC. 7. Article XIII, of the Constitution of Missouri, provides: "*That no private property ought to be taken or applied to public use without just compensation.*"

This declaration is, in substance, and meaning, the same as the last clause of the fifth amendment of the Constitution of the United States: "*Nor shall private property be taken for public use without just compensation.*"

Similar provisions are found in the Constitutions of all of the States—that of 1802, of Ohio, provided: "*Private property ought, and ever shall be held inviolate; but always subservient to the public welfare, provided a compensation be made to the owner;*" and her present Constitution contains like provisions.

Such Constitutional provisions, or declarations of right, do not confer the power of eminent domain, but are properly limitations upon its exercise. The power itself is an incident of

sovereignty; and its exercise is conferred upon the General Assembly in the general grant of Legislative authority; and may be exercised directly or indirectly by the General Assembly, without the intervention of the Judiciary, except for the purpose of determining the amount of compensation. But the Courts possess full power to determine its proper limits and to prevent abuse in its exercise.

Giesey vs. *C. W. & Z. R. R. Co.*, 4 O. St. R. 308.

That the General Assembly possesses the Constitutional power to confer upon municipal corporations the right to appropriate grounds belonging to private individuals to the public use, as a street, etc.. admits of no question; but it is necessarily open to be questioned in any case whether the Act of the General Assembly by which this is attempted to be done, is effectual for the purpose. In the nature of things, certain requisites must concur, and proper provision be made for the protection of the rights of the owner whose property is to be taken—the *use* must be such as the *public* welfare demands, or a *public* use. "The property of one citizen can not, without his consent, be appropriated for the use of another citizen,"

McArthur vs. *Kelly, et al.*, 5 O. R., 139.

"No valid appropriation of private property for public use" (except immediately by the Sovereign in a case of *immediate* necessity) "can be made without a *law* providing compensation to the owner."

Lamb & McKee vs. *Lane*, 4, O. St. R. 167.

"And a law providing for the appropriation of private property for public use, is void, unless it provide the owner a compensation."

McArthur vs. *Kelly, et al.*, (cited above); *Foot* vs. *Cincinnati*, 11 O. R., 416; *Gardner* vs. *Trustees of Newburgh*, 2 J. C. R., 162, 463; 7 J. C. R., 329, 332, 436; Vat., 1 C., Sec. 244; 1 *Barn & Cres.* 139; 2 *Kent Com.*, [339.]

Assuming these to be settled elementary principles, we come to inquire whether in the case under consideration, the General Assembly of Missouri, by any valid law which was in force

at the time the proceedings were had, by which it is claimed that the property of the complainant was condemned, had conferred upon the city of St. Louis power to make such condemnation?

So far as material, under this inquiry, it will be found that the only Legislative enactments in force at the time said proceedings were had, were contained in Article VI, Sections 2, 3, 4, 5, and 6, of the Act of February 23, 1853. (Revised Ordinances of 1861, pages 172-3.)

It will be seen that no *direct* or *express* power to appropriate private property is conferred upon the city; but the grant of such power may, perhaps, be reasonably inferred, or implied from said enactments, particularly section 2, which provides that: "Whenever the City Council shall provide by ordinance, for establishing any street, lane, etc., and it becomes necessary for that purpose to take private property, and no agreement can be made with the owner or owners thereof, just compensation shall be made therefor to the person or persons whose property shall be taken."

Without questioning the sufficiency of the grant of power to take private property for the uses enumerated, arising by implication, we ask attention to what follows as the provision to secure compensation to the owner. It is declared that "just compensation shall be made therefor," etc. By what means? The compensation to be made, "the Mayor shall cause to be ascertained by a jury of twelve disinterested freeholders of the city, the particulars of which proceeding shall be prescribed by ordinance." "The Mayor shall appoint a day for empaneling a jury and ascertaining the damages, at least sixty days notice of which shall be given to the persons whose property is proposed to be taken; and if any of the owners thereof are unknown, can not be found by the Marshal of the city, or are absent from the city, publication thereof shall be made in," etc. "notifying all owners and others interested in the property proposed to be taken, and in the improvements to be made, that on the day therein named, the Mayor will cause the property therein de-

scribed to be condemned for public use as an alley, street, etc., and damages to be assessed therefor," as provided in said act; "and such notice by publication as aforesaid, shall be binding," etc. "It shall be the duty of the jury, first to ascertain the actual value of the land proposed to be taken," etc.; "then for the payment of such sum, to assess against the city *the value to the public generally*, of the proposed improvement; and to assess the *balance* against the owner or owners of the property fronting on such lane, alley, street, etc., and in the blocks next adjacent on either side or end thereof. [This is amended by the act of March 5, 1855, so as to read "benefited thereby" instead of "fronting on," etc.] according to the value of the property so assessed, and in the proportion that the owners thereof may be respectively benefited by the proposed improvement; and the sum or sums to be paid by the owner or owners of property respectively benefited by the improvements, as ascertained by the jury, shall be a *lien* or *liens* upon the property so charged, *and shall be collected* AS PROVIDED BY ORDINANCE."

It is further enacted, in substance, by the 5th and 6th sections that the Mayor should have power, for good cause shown, within ten days after the return of the verdict of the jury, to set it aside and cause a new inquest to be made; and if the verdict were not set aside, it was made the duty of the Mayor to report it to the Council within four months; and if an appropriation was made by the Council within three months thereafter, to pay the sum or sums awarded to be paid *by the city*, it was then lawful for the city to take possession of the ground so condemned to public use.

It is very remarkable, that in all this, (and these are the whole of the provisions of the statute in force when the proceedings were had to condemn the property of the complainant,) there is no provision whatever requiring payment to be made to the owners of property so condemned and taken.

Provision is made for the assessment by a jury of the value of the property condemned, and, as a means for the payment

of such value, the jury is required to assess against *the city* the value to the public generally of the proposed improvement; and the *balance* of the value of the property condemned, the jury are to *assess* against the owners of the property to be benefited by the improvement, in certain specified proportions, which is made a lien upon the property so assessed. Thus far very well—but there is a total failure to make any provision whereby the owner whose property is condemned may realize the value of his property from the assessment so made or otherwise. The assessment is declared to be a *lien* upon the property upon which it is made, and that it is to be *collected "as provided by ordinance."* But, admitting that it was competent for the General Assembly to delegate to the city authorities the power to legislate a remedy whereby the collection should be enforced, (which we deny,) and if the money were collected and in the coffers of the City Treasurer, there is not contained in any act of the General Assembly or any ordinance, if that were adequate to the purpose, any provision requiring its disbursement in payment to any person whose property was condemned, or entitling such person to demand it. It is no answer to this to say, that this or that, was, no doubt, the intention; the question is, whether any provision is made, express or implied, making it the duty of any officer, to pay money so collected, to persons whose property has been condemned, or conferring upon such persons the right to demand it? What is the form of procedure? By whom is the warrant for such payment to be issued? If refused to be issued, what remedy has the party entitled to it, to coerce it to be done? or what is his remedy if payment be refused? These are matters which admit of regulation bystatute only. It were a vain thing to have the damages assessed by a jury and stop at that without further legislation; and, being assessed, it were equally vain to declare that the assessment should be a *lien* on property, and stop at *that*. A lien, in whose behalf? By whom and in what way to be enforced? If there would be, in such a case, a remedy at law or in equity, at whose suit might it be had? Unless a remedy were prescribed in behalf

of some person, natural or artificial, it would, obviously, be a dead letter, (void because powerless to be made available,) to have the assessment made and declared to be *liens.*

But it will be said, perhaps, that the Legistature has not overlooked this important part of its duty—that it has provided, in express terms, that the assessments "*shall be collected as provided by ordinance,*" and that the City Council duly enacted an *ordinance* in pursuance of this legislative grant of power, to meet the necessity. We have several things to say about this, and first if the validity of such a course of legislation were conceded, the same legal difficulty would exist in regard to the availability of the fund to the party injured, which we have noticed above—no provision was made in the *ordinance* on that subject.

But we deny that it was competent for the General Assembly to delegate to the city authorities the power to legislate a remedy by ordinance, or in any way, to cause the payment or collection of the assessments.

In passing, it is proper to notice, that the act of the General Assembly excludes every other remedy for such collection, it any other had existed, the provision is,—"and shall be collected *as provided by ordinance.*" That way and no other. But it is enough to say that none other was provided.

It will be noticed that the act of the Assembly referred to was approved February 23d, 1853, the ordinance (No. 3477,) referred to in the proceedings in question, was ordained by the City Council Dec. 12, 1855; nearly three years after the passage of the act. Its material provisions now brought under consideration, are copied at length into the substituted bill of complaint on pages 18, 19, 20 and 21, to which we take leave to refer for particulars. It will be found to embody a pretty full code of law—if it be law—upon the subject, based very largely, it is true, upon the act of the Assembly, and thus far we find no fault with it. The provisions of the act of Assembly thus imported into the ordinance continue to have their force and value as law, not by force of the ordinance, but of the act. But

beyond that we find in the ordinance provisions conferring upon the Mayor judicial powers, not before or otherwise devolved upon him. He is to enter judgment upon the verdict within a limited time, against the parties assessed, to issue execution upon the judgment, etc. Then follow detailed provisions prescribing the duty of the Marshall to whom it is to be addressed, and by whom it is to be executed. The form of the writ is prescribed—its effect—the duty of the Marshal in advertising the property for sale, time and place of sale, the deed and what it shall recite, to be made by the Marshal to the purchaser, and its legal effect as to the title to be vested in the purchaser.

We can not insist that any of these provisions, *per se*, would be inapt or objectionable to be embodied in a law providing for the collection of the assessments through the agency of a competent judicial tribunal, if enacted by the constitutional law-making power; but we deny that they have any force as law, because the City Council had not power so to legislate, and the General Assembly could not constitutionally delegate such power to it.

The Constitution of Missouri, Art. III, Sec. 1, provides that "the legislative power shall be vested in a *General Assembly*, which shall consist of a *Senate*, and of a *House of Representatives*."

That this provision vests in the *General Assembly*, exclusively, the law making power, admits of no doubt; and none exists in regard to the power being such as may not be delegated.

It has, however, been attended with some difficulty, or nicety of discrimination, to determine what is a strictly legislative act; and to discriminate between acts necessarily involving the exercise of the law-making power, and such as arise out of a strictly proper legislative enactment, and require ministerial regulation and action at other hands, in carrying into execution the legislative enactment.

"The true distinction is between the delegation of power to *make* a law, which necessarily involves a discretion as to what it

shall be, and conferring an authority or discretion as to its *execution*, to be exercised in pursuance of the law."

C. W. & Z. R. R. Co. vs. *Commissioners of Clinton Co.* 10 O. St. R. 88-9.

"The making of a law prescribing by what persons, or by what body, when, and in what manner, taxes should be laid and collected, is the exercise of a legislative power; but the making of a resolution, or order, or the determination or direction by the person or body appointed for such purpose by the law, that taxes shall be laid and collected, is simply the *execution* of an authority granted by Statute." (*Ibidem p.* 91-2.)

"A law designating the persons, or body of persons, by whom a tax may be imposed, and the mode in which it shall be collected and distributed, requires the authority of the constitutional law maker, for it is a rule of action prescribed. But the act of the delegated persons or bodies, depends for its authority altogether upon the law commanding or permitting it to be done."

Parth vs. *The Commonwealth*, 6 Barr, 507.

"The one is the exercise of sovereignty, the other, in its very nature, a subordinate function."

We deem it quite unnecessary for present purposes to enter more at large into an illustration of the differences between a *legislative* power and an *executive* duty.

The General Assembly prescribed the steps of procedure to be observed, to, and including the verdict of the jury awarding damages to owners of property condemned, and making assessments for benefits, but there stopped; making no provision in regard to the steps of procedure to be observed to enforce payment of the assessments; or for the appropriation and payment thereof when collected, in satisfaction of the damages awarded. All *that* was delegated to the city authorities, to be provided for by ordinance; and we need only look into the ordinance adopted to supply the necessity, to be assured that it required the exercise of legislative power of a high order, if what was embodied in the ordinance were necessary; as before noticed, nothing less than the conferring of judicial power, including the rendition of

judgments—issuing of execution—passing title to real estate—and even the seizure of the body in satisfaction of the execution. The express provisions of Sec. 5, of the ordinance, is, that the execution shall be directed to the Marshal, whose duty it shall be to collect the same from the owners of the property charged in the same manner as executions are collected, issued by the Recorder.

Such was the fiat of the ordinance, whether warranted or not by the authority delegated by the General Assembly; and in either case it was equally void. If delegated, it was void for want of power on the part of the General Assembly; if not delegated it was void as a usurpation of power.

Having stated the principle it is thought unnecessary further to illustrate that the enacting of the ordinance was the exercise of legislative power, and not a ministerial or executive act.

Vide.—Sedgwick on Stat. and Const. Law, 164, 165, 166, 463, 464, &c.

But if the act of Assembly and ordinance in question were not void for the reasons above set forth, the proceedings instituted under them, as against this complainant have fallen to the ground, as no power in law exists, warranting them to be carried into execution as threatened by the defendant to the injury and prejudice of the complainant; because both the act of Assembly and ordinance are repealed without any saving.

These enactments being in derrogation of the rights of individuals, by which they are to be deprived of their property without their consent, do not belong to the class of laws called *remedial*, but being penal in their operation, should be classed with penal laws in determining the effect of their repeal without a saving of pending proceedings under them.

"A repeal of an act authorizing a course of procedure, *by a public officer* invalidates the proceedings, if unfinished, at whatever stage they may have arrived." *Williams* vs. *County Commissioners*, 35 Maine, p. 345.

"Thus, in Pennsylvania where an act was passed authorizing

a street to be opened in Pittsburgh, and providing for the assessment of damages; it was held that the repeal of the act before the street was opened, *rendered void* all proceedings taken, and the parties in whose favor damages had been assessed could not recover the compensation reported in their favor." *Hampton* vs. *Commonwealth*, 7 Harris, (Pa.) 329.

"So if a statute confer jurisdiction in *civil* cases, and though suits may be instituted and be pending at the time of the repeal, the jurisdiction is gone and with it all the proceedings fall to the ground." *Stover* vs. *Murnell*, 1 *Watts*, 528; *Butler* vs. *Palmer*, 1 *Hill*, 324; *Mitchell et al.* vs. *Eyster*, 7 O. R. pt. 1, 261-2; *Sedgwick on Stat. and Const. Law*, 129, 130, 131, 132.

The act of Assembly in question was repealed by Sec. 28 of the act of March 14, 1859, without any saving; and by Sec. 16 of said act, a new set of provisions, *wholly prospective*, and wholly different in terms, was enacted, (see p. 29, 30, 31, 32,) of the substituted bill of complaint.

The ordinance was repealed by Sec. 23 of the Ordinance No. 4778, Art. II, approved January 17, 1861. (See Revised Ordinances of 1861, page 483,) which also substitutes in place of the old ordinance, an entirely new mode of procedure.

We understand that it will be argued in behalf of the defendant in support of the demurrer that this court can not exercise jurisdiction for the reason that the relief sought is to enjoin or invalidate the judgment of a State Court.

The clear answer to this is, that the proceedings sought to be injoined, were not had "in any *Court of a State*," and therefore are not excluded by the act of Congress, from the jurisdiction of the Federal Courts.

The functions of the Mayor, *confered by the acts of Assembly*, bearing upon the question, (Ante, pages 13. 14, &c.,) are not *judicial*, but purely *ministerial* or *executive*.

He is required to summon before him a *board of appraisers*, called in the act, a jury, "whenever the City Council

"shall provide by ordinance, for establishing any street, "lane," etc., and to give notice as prescribed by the act, to the persons whose property is proposed to be taken, of the day named by him when he will cause the property described to be condemned, &c., "and the damages to be assessed," &c. The act then prescribes the duty of the jury, and declares the verdict to be a lien, &c.—directs it to be signed by each juror and to be delivered to the Mayor. If not set aside by the Mayor, he was required by the act, to report the verdict to the Council within four months; and if an appropriation were made by the Council within three months thereafter to pay the sum awarded to be paid by the city, it was, by the act, made lawful for the city to take possession of the ground so condemned to public use.

Now this is, in its entirety, the very substance of the acts of assembly from which, if at all, it can be claimed that the Mayor was, by the law making power of the State, constituted *"a Court of a State,"* in the meaning of the act of Congress.

But it is said that the act of Assembly also provides that the assessments against the owners of property for benefits to accrue from the proposed improvements *"shall be collected as provided by ordinance"*—and that under this grant of power to collect as provided by ordinance, it was competent for the municipal body, by ordinance, to vest the Mayor with *judicial* power—to create him a *"Court of the State."*

All this we have controverted in the preceding pages for reasons assigned. We now deny that the ordinance relied npon, if a Court of the State could be created by such means, could be so construed.

On inspection of the provisions of the ordinance, the substance of which is set out on pages 6 and 7 above, it will be seen

that this question depends on the legal effect of a single clause of Section 5, the substance of which is, "that if the City "Council make an appropriation to pay the sum awarded to "be paid by the city, the Mayor *shall render judgment* "against the *parties*, charged by the verdict for the payment "of the damages," &c.

The form of the expression "*shall render judgment*," accords with an act appropriately to be the done by a judicial Court—but does this constitute a Court? But further, does such judgment, if it may be so denominated, add, in the smallest degree, to the obligatory effect of the *verdict.*

The *verdict*, if anything, creates the liability and operates by way of lien upon the *property* assessed. It has not the least effect upon the *person*—and any attempt to give it such effect by the *judgment* of the Mayor to be rendered *against the parties*, was, of course, a legal absurdity.

The Federal Court is not, therefore, excluded by the act of Congress from exercising jnrisdiction, if the complainant, upon the allegations of his Bill, shows grounds for equitable interference.

The threatened execution, is, in its true legal nature, a mere *order*, to be issued by authority of the ordinance *to enforce the payment* of the *assessment* by the jury. If that assessment be void, as we allege, it should be injoined in equity, for the reason that, if not declared void, a sale under it would embarrass the title—and although void, is a cloud on the title.

If it were conceded that the legislative enactments and ordinance of the city were constitutionally valid and unrepealed

they nevertheless fall very far short of securing to the owners of property condemned *any* compensation for it. If all that was enacted and ordained were put into execution, and the money assessed were in the hands of the Marshal, it would simply be a satisfaction of the judgment of the Mayor *in favor of the city*. The complainant would not have any right to demand or receive a cent of it; and as in any case of money made on execution, the officer collecting it, would hold it for the *plaintiff in the writ*,—the City of St. Louis in this case. It would be his duty to pay it into the City Treasury, and when there the complainant would have no right to demand its payment to him. No provision of law or city ordinance exists, or did exist, whereby he could demand a cent of it, as a matter of right; or in virtue of which the Treasurer would be warranted in paying it to him. The consequences of the enactments and ordinances as they stood when these proceedings were had, would, if carried out to the letter, have been these; *First*—That part of the property of the complainant sought to be condemned, would have been appropriated to the public use; the act of Assembly allowed that to be done, so soon as the City Council made the *appropriation* of the $100 assessed against the city—which was done, and the property, in fact, seized and converted to the public use. If the proceedings are valid it is lost to him *in law*; if invalid, still it is lost to him *in fact*, being permanently converted into a public street of the city and in use as such. *Second.* The property of the complainant, against which assessments were made for benefits, if sold for their payment, would thereby, also, be lost to the complainant, and the proceeds realized left in the coffers of the city in no way subject to his control, and without warrant for their payment to him.

Still further, the assessment of $100 was made against the city, and an appropriation was made for its payment; for what and to whose use? For the property condemned, and to the use of the owners, it will be answered; very true that was the *purpose*—but who were the owners? A number of individuals in no wise jointly interested, whose several property was con-

demned; and for this property, *considered in gross*, this assessment was made against the city; the property was several, the appropriation is of a gross sum. To whom does it belong? In what proportions? How, and by whom are these proportions to be worked out and the money applied? These are things not provided for by law or ordinance. It will not do to say the sum is small and of but little consequence; it is not *this* sum that is to determine the point; nor are the rights of these parties to be slurred over in any such perfunctory way. A principle is involved. *That* is not to be solved by the magnitude or insignificance of the sum. Great or small, each individual is entitled to his just part of it. What provision is made securing it to him? None.

This same difficulty, in principle reaches much further than merely to this $100. Other assessments are made, some, as in this complainant's case, against persons in respect to property not appropriated, to compensate the same persons, for property appropriated; others in respect to property benefited, the owners of which are not otherwise interested. The proceeds of these assessments are all to be gathered, as the fruits of executions upon the judgments in favor of the city against the various persons assessed. When gathered into the Treasury of the city, it is a *joint* fund, so far as the owners of the property *appropriated*, can be regarded as in any way interested in it; and is subject to all the same uncertainty and want of individual right which we have noticed as appertaining to the $100 appropriation; and others besides. Such, for instance, as a failure of some of the parties to pay their assessments, or to be made to pay them by force of execution. Who is to lose or be docked, in such cases? How is the deficiency to be made good? Each party whose property is taken is entitled, under the constitution, to compensation, which means *full* compensation.

It is the city, the municipal corporation, *that* condemns. It is upon *that* corporation, or the *State* under whose authority the condemnation is made that the obligation constitutionally rests to make compensation. The owner is not to be turned off with any

mere pretence that such and such *provision* has been made to raise the required sum by assessments, if it happen to be successful. The constitutional right to *full* compensation is absolute, and the provisions of law for its being made, should be equally certain or absolute, and anything less than that is an unconstitutional provision, and all proceedings founded upon it, for the appropriation of private property are unwarranted by the constitution.

If it is constitutionally competent for the city to make special assessments for benefits, it is inconsistent with the rights of the owners of property taken for its use to subject them to the delay and risk incident to the collection of such assessments—and especially to collect into its own coffers the assessments so made, without any stipulation, or appropriation by law, for their application: thus leaving the parties interested, without remedy, and even without an authoritative declaration of a right to have them applied. Indeed, the whole theory that a municipal corporation, has the right to appropriate private property to its use, and may acquit itself, in its corporate capacity, from liability to make compensation to the owner, by appropriating $100, out of $18,000, and by turning over the owner for the balance to the fruits of special assessments for benefits against certain individuals, can only be regarded as an unconstitutional subterfuge. If it appropriate, as a corporation, the constitutional obligation, rests upon it as a corporation, to make compensation. Upon no just principle can it discharge itself from that obligation by a mere *assessment*, for its payment, upon all or some part of its citizens. If it have the power to make such assessments as a means, let it be done; but let there be no evasion of *its* obligation to make compensation.

But was this an appropriation of property to *public use?* If in fact the city at large were benefited only one part in eighteen hundred, and a few individuals, the remaining seventeen hundred and ninety nine parts, it would be absurd to pretend that the appropriation of private property to such a use, would be any other than to the private use of the persons benefited,

and not a public use. Is not the disproportion between the public and private benefits, as found by the jury, in this case, such as to show that not the *public use*, but that, as charged in the original bill, some covert and undisclosed motive, of personal interest, prompted the movers in this sequestration of private property under the forms of law.

The injustice of such a proceeding is not confined to the loss of ownership of property, taken against the will of the owner; but the pretended compensation offered him is fictitious and unreal.

The jury in this case condemn property which they value at $18,492; they say the public benefit arising from its use is only $100; and "for the residue," viz: $18,392, they thereupon assess the adjacent property "acccording to the value of the property assessed, and *in the proportion* that the owners thereof are respectfully benefitted by the proposed improvement."

They do not find, nor does the law require them to find, that the adjacent property is *actually benefited* to the extent of their assessment of $18,392; but if, as we may well assume, it is benefited to no greater extent than the city generally, still this "residue" of $18,392, must be assessed upon the adjacent property "*in proportion* as its owners are benefited." Sound policy and common justice alike stand opposed to the recognition of such a system, by a court of equity, as a compliance with the constitutional rights of the citizen, that private property shall be inviolable, except only when required for *public use*; and when appropriated to public use that just compensation shall be made therefor.

With such cases as this before us, we may well understand why the Legislature, the very year after these proceedings, in 1858, repealed the charter under which they were had, and recurred to the system, theretofore in operation, which required the city to go into one of the State courts, on its petition to condemn private property when it was needed for public use; and gave to every owner whose property was so taken, a judgment against the city for the value of his property.

The proceedings are void as against the complainant, if their constitutionality were conceded, because he was not personally served with the notice and writ issued by the Mayor; nor was publication thereof made, so as to affect him with constructive service, as required by the Act of Assembly; nor did he appear personally or by attorney. The bill of complaint so avers, and the demurrer admits the truth of the allegations that are well pleaded.

First.—As to the appearance shown by the record, by Mr. Bakewell, as attorney for the complainant.

The Bill avers that this was without authority—this is to be taken as true on the demurrer, and the question is, whether if there were no legal service of process and notice, actual or constructive, may the complainant be relieved in equity against the verdict and judgment, on that ground.

The proceeding if warranted in law, was both *in rem* and *in personam*. *In rem*, so far as it regards the condemnation for public use—*in personam*, so far as regards the assessments and judgment for benefits. It were legally impossible to sustain the former unless the latter can also be sustained. That would be to condemn without compensation, even if this method of providing for making compensation be constitutional.

A proceeding *in personam*, is *coram non judice*, and may be avoided if the party to be affected by it have no day in court. But what is his remedy? If he have a clear and adequate remedy at law, he may not ask relief in equity. Courts of law, of general jurisdiction, relieve in such cases on motion against their own judgments; and courts of equity refuse to grant relief because that remedy exists at law.

But here, the proceeding is not according to the course of the common law. In that sense there is no court of law to apply to. But further, under the circumstances the Mayor was a mere functionary of the city corporation, and to appeal to him for relief, against his judgment in favor of the city, would, in effect, be an appeal to the generosity, or sense of justice, of our ad-

versary. And his power to exercise jurisdiction over the subject, if any he ever had, by motion, no longer exists as both the Act of Assembly and ordinance are unqualifiedly repealed, and his vocation as a judge is extinct.

But courts of equity relieve by injunction against instruments void in law, though this has sometimes been doubted, as the defence is available at law.

Daniels' Chancery Practice 1899, refering to 2 Swast. 457 n. where all the cases on this subject are collected. *Simson* vs. *Lord Howden*, 3 M. and C. 97; *Story's Eq. Jur.* §. §. 699–707; *Bromley* vs. *Hollland;* 5 *Sumners Vesey*, note (*a*) and cases cited.

It may be said, however, that if, as we claim, the proceedings are void, no *valid* adversary title can be acquired under them, and that we may with safety rely upon making good our defense against any such title when it shall be attempted to be asserted.

Whatever force may seem to be in this suggestion, yet it does not afford a clear and adequate remedy; and that is the test. A material part of the complaint is, that a doubt is cast upon the title of the complainant, a doubt, which affects its value and prevents his selling, or disposing of it, or improving it for use, as beneficially and profitably as he might otherwise. No one can fail to appreciate that this is a matter of substance. The Act of Assembly, in express terms declares that the assessments for benefits shall be a *lien* upon the property. This being so, the owner himself, so long as the judgment subsists in form, could not feel safe in erecting improvements: and much more would persons who would otherwise be desirous to purchase, be unwilling to incur the risk. The proverbial uncertainty of the law, in an unadjudicated matter such as this, would, and does, effectually place the property out of market. For such is the uncertainty, that even here, in this case, the legal validity of the assessments and judgment is insisted upon in behalf of the city.

The case, we therefore submit, is such as peculiarly calls for

equitable relief by injunction, and a decree pronouncing the assessments and judgments to be void.

We deem it unnecessary to set forth in detail the reasons why the want of actual service, and the imperfections of the publication of notice, and of the substance itself, of the notice were not such as to bring the complainant subject to the jurisdiction of the Mayor. These are averred in the bill, the legal effect of which is obvious; but over and above all these, stands the objection against the judicial power of the Mayor, resting as it does upon the mere ordinance of the city, and void for all the same reasons urged in another connection in this argument.

It may be claimed on the part of the defendant that the *judgment* of the Mayor is subject to be reversed on error, and that this is a remedy for the evils we complain of. The first answer to this is, that if, as we assume we have shown, the Mayor was not vested with judicial power, no writ of error would lie to reverse his judgment. But second: If that were not so, the remedy would not be complete or adequate. If the Mayor's judgment were reversed, the assessments by the jury for benefits, would still remain; and these were, by the Act of Assembly declared to be liens upon the property.

If our equitable grounds are well taken, we are entitled to relief against the assessments as well as against the judgment of the Mayor.

We have omitted to notice in passing, a ground for relief alleged in the Bill which we will merely bring to view in this place, namely, that the power of the Mayor to render judgment for the assessments, was limited to be exercised *within twenty days* after the City Council should make an appropriation for the payment of the sum awarded to be paid by the city.

There is no doubt of the power of the Mayor being so limited; and the allegations of the Bill are explicit, that it was

not exercised within the time so limited. Hence the point is well made upon the demurrer, and must be sustained.

II. Thus far our argument has had for its object to establish the right of the complainant to enjoin the defendant from proceeding by execution upon the judgment of the Mayor; and to have said judgment, as against the complainant, together with all of the proceedings on which the same was founded, decreed to be void. We now come to consider the second branch of the case, praying for damages in the way of compensation for his property unlawfully seized and in fact appropriated to the use of the city in establishing and opening Wash Street. The fact that it has been so appropaiated to the value of $6,852 50, according to the assessment of the jury, stands uncontroverted, as well as the fact that the appropriation so made is of a permanent character, looking to a perpetual use, in connection with like property of other individuals. Its character as private property, is for practical purposes by the act of the defendant, annihilated, and the injury to the rights of the complainant is commensurate with its fee simple value. What that value may be will be a subject for inquiry subject to the order of the court. The verdict of the jury is not, nor do we refer to it as affording a legal basis of value; but it may be referred to as a reasonable basis of probable value for the present purposes of the case, as showing a substantial subject matter for equitable relief, and such as affords jurisdiction, in point of value, for this court.

The question is, is the case on this branch of it such as in which the complainant is entitled to equitable relief by a decree for compensation? Why may he not sue in trespass in a court of law and recover damages?

The first answer to this suggestion is, that *adequate* relief can not be had in such an action, the measure of damages being, only compensation for the injury sustained at the commencement of the action, and in order to obtain adequate, or full damages, commensurate with the injury, an indefinite suc-

cession of actions would be necessary to be repeated from time to time as long as the injury or use of the property, for the purposes of a street, may be continued. But a court of equity will look to the true nature of the trespass, and make a compensation adequate to cover the future as well as the past use and appropriation; and in so doing will indemnify the defendant against future actions at law for the trespass, by injunction, or by placing the complainant under terms, commensurate with the relief granted upon his prayar for compensation. The acts of the respective parties, form, in such a case, the true basis for equitable action. The defendant, by a legal trespass, has made a permanent appropriation to a public use. The complainant insisting upon his right and asserting the trespass, prays compensation. A court of equity will take cognizance of the true character of the case, the injury complained of being in its nature irremediable, at law, and will adjust the whole rights of the parties, according to equity. This, without anything further, gives the court jurisdiction.

But there is, in the case, a further and and equally certain ground for jurisdiction. The subject matter of relief under the first branch of the case, for relief against the assessments, and, this second branch, for compensation, together, form but one subject matter; all arising out of one proceeding, inaugurated by the defendant to the injury and prejudice of the complainant. It is the peculiar province and duty of a court of equity, under such circumstances, to do complete justice. Having jurisdiction for one purpose it will determine all rights, incident to, or growing out of the entire subject matter.

~~H. H. HUNTER, *Sol. for Complainant*~~

Thomas Emmet
for Applt.

Supreme Court of the United States.

No. 151—December Term, 1866.

PHILEMON B. EWING, APPELLANT,

vs.

THE CITY OF ST. LOUIS, APPELLEE.

Brief for Appellant.

I. The Federal Courts have jurisdiction in this case, withstanding the Judiciary Act of March 2, 1793, bec the Mayor of St. Louis was in no sense a State Court.

(1.) The Act of Assembly, by which power alone a S Court could be erected, gives to the Mayor ministerial p ers only, and not judicial powers.

Tillotson vs. Cheetham, 2 John, 63; 4 Dallas, 22

(2.) The City Council of St. Louis had no authorit law to erect a Court, or authorize any officer to render a cial judgment. And it was not competent for the Leg ture to have delegated them such power, had it undert to do so.

Constitution of Mo., Art. III, Sec. I.
" " " V, Sec, I.
C. W. & Z. R. Co. vs. Comssers, &c., 1 Ohio St. Rep
Parth vs. Commonwealth, 6 Barr, 507;
Sedgwick on Stat. & Con., Law, 164, 5, 6; 463, 4 &c.

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No. 151—December Term, 1866.

PHILEMON B. EWING, APPELLANT,

vs.

THE CITY OF ST. LOUIS, APPELLEE.

Brief for Appellant.

I. The Federal Courts have jurisdiction in this case, notwithstanding the Judiciary Act of March 2, 1793, because the Mayor of St. Louis was in no sense a State Court.

(1.) The Act of Assembly, by which power alone a State Court could be erected, gives to the Mayor ministerial powers only, and not judicial powers.

Tillotson vs. Cheetham, 2 John, 63; 4 Dallas, 229.

(2.) The City Council of St. Louis had no authority in law to erect a Court, or authorize any officer to render a judicial judgment. And it was not competent for the Legislature to have delegated them such power, had it undertaken to do so.

Constitution of Mo., Art. III, Sec. I.
" " " V, Sec, I.
C. W. & Z. R. Co. vs. Comssers, &c., 1 Ohio St. Rep. 88;
Parth vs. Commonwealth, 6 Barr, 507;
Sedgwick on Stat. & Con., Law, 164, 5, 6; 463, 4 &c.

(3.) Both the Acts of Assembty and the City Ordinance under which the Mayor assumed to act, in rendering the judgment complained of, have been repealed without any saving—and all acts done or threatened under color thereof. are wholly without authority of law.

Stover vs. Murrell, 1 Watts, 528, (258);
Butler vs. Palmer, 1 Hill, 324;
Mitchell, et. al., vs. Eyster, 7 Ohio R., pt. 1, 261–2;
Hampton vs. Commonwealth, 7 Harris, (Pa.) 329;
Williams vs. Commissioners, 35 Maine, 345;
Sedgwick on State & Con. Law, 129, 130, 131, 132;
Hunt vs. Jennings, 5 Blackf. 195;
Dern vs. Hampden, Paine 55.

II. This is a proper case for Equity jurisdiction.

Fervin vs. Lewis, 4 Mylne & Craige, 254;
Gardner vs. Trustees, &c., 2 John C. R. 161;
Belknap vs. Belknap, 2 John C. R., 463;
Burnet vs. City of Cincinnati, 3 Ohio, 86;
Bank U. S. vs. Shultz, 2 Ohio, 506;
Anderson & wife vs. Comssers, 12 Ohio S., 366;
Oakley vs. Trustees, &c., 6 Paige, 265;
Story's Eq. Jur., Vol. 2, Sec. 825, 826, 873, 909, 915 to 918; 955 to 959;
Walker vs. Wynne, 3 Yerg., 62;
Am. Ins. Co. vs. Fish, 1 Paige C. R,, 90;
Whitlock vs. Duffield, 2 Edw. Ch., 366;
Rees vs. Smith, 1 Ohio, 124;
Simson vs. Ld. Howden, 3 M & C., 97;
Bromley vs. Holland, (5 Sum. Vesey, Note *a*);
Story's Eq. Jur., 707, 699.
Daniel's Ch. Pr. 1889 --2 Swast. 457 n.

III. Our standing in Court being established, we are clearly entitled to a Decree setting aside the pretended judgment and enjoining execution thereof, on the ground

that the Mayor had no authority in law to render judgment or issue execution.

VI. We are further entitled to a Decree setting aside the *Verdict* and its pretended *lien* on our property, for the reasons:

(1.) That the scheme for taking private property for public use, in the execution of which this verdict arises, provides no compensation for the property taken, and is therefore unconstitutional and void.

Lamb & McKee vs. Lane, 4 Ohio S., 167;
McArther vs. Kelley, et al., 5 Ohio, 139;
Gardner vs. Trustees, &c., 2 John C. R., 162, 463;
7 John C. R., 329, 332, 436;
Vat, 1 C., Sec. 244:
1 Barr & Cress, 139:
2 Kent's Com., 334,
1 Bald., 204:
4 Wash. C. C. R., 601.

(2.) The proceedings had by the [illegible] were void as to appellant, for want of notice actual or constructive.

(3.) The law under which these proceedings were had has been repealed without any saving.

Vide, authorities above quoted as to effect of repeal.

V. The Court having jurisdiction of the parties and the subject matter, will determine all rights and equities growing out of the case—and will decree compensation for the lands actually appropriated and in the use and permanent occupancy of the Defendants.

T. EWING, JR.,
For Appellant.

SUPREME COURT OF THE UNITED STATES,

No. 244.—DECEMBER TERM, 1865.

PHILEMON B. EWING, APPELLANT,

vs.

THE CITY OF ST. LOUIS, APPELLEE.

Brief for Appellee.

The bill in this case seeks to set aside, as invalid, certain judgments rendered by the Mayor of the City of St. Louis against the complainant, in a proceeding had before said Mayor, in pursuance of law, for the opening of Wash street; which judgments were for certain amounts assessed by a jury against complainant's property, as benefits resulting to complainant from the opening of said street.

The bill also prays a perpetual injunction against any proceeding by the City of St. Louis upon said judgments, and for an account of the just and true value of the complainant's real estate taken by the defendant for the opening of Wash street.

The object of the bill, therefore, is to procure a revision by the Federal courts of proceedings had before a local State court in the matter of opening a street.

The demurrer to the bill was taken and sustained in the court below on the ground that a Federal court has no jurisdiction of the matter; and in support of the judgment of that court, the appellee relies upon the following points:

I. The proceedings instituted by the City of St. Louis for the opening of Wash street were judicial proceedings, and the Mayor of said city was, *pro hac vice*, a court, and, as the bill alleges, rendered judgments as a court in the premises.

Longfellow vs. Quimby, 29 Maine, 196.

The case is therefore clearly within the purview of that provision of the Judiciary act of March 2, 1793, § 5, (1 Stat. at Large, 335,) which prohibits the granting of an injunction by a Federal court to stay proceedings in a State court.

II. But if the case be not one of that character, still it is not one for the exercise of the equitable jurisdiction of the court, because if the court could take jurisdiction at all of the revision of the Mayor's proceedings, there is a plain, adequate, and complete remedy at law, by *certiorari*.

Heywood vs. Buffalo, 14 New York, (4 Kernan,) 534 ;
Nichols vs. Sutton, 22 Georgia, 369 ;
Myers vs. Simms, 4 Iowa, 500 ;
Longfellow vs. Quimby, 29 Maine, 196.

III. The review and correction of all errors, mistakes, and abuses in the exercise of subordinate public jurisdictions, and in the official acts of public officers, belongs exclusively to a court of law, and has always been a matter of legal, and never of equitable, cognizance.

Mooers vs. Smedley, 6 Johns. Chy. R. 28 ;
Brooklyn vs. Meserole, 26 Wendell, 132 ;
Van Doren vs. New York, 9 Paige, 388 ;
Heywood vs Buffalo, 14 New York, (4 Kernan,) 534.

C. D. DRAKE,
Solicitor for Appellee.